DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-9335
Title: Allen Ryan Alleyne, Petitioner
v.
United States
Docketed: March 16, 2012
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (11-4208)
Decision Date: December 15, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 14 2012	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due April 16, 2012)
Mar 22 2012	Waiver of right of respondent United States to respond filed.
Mar 29 2012	DISTRIBUTED for Conference of April 13, 2012.
Apr 10 2012	Response Requested. (Due May 10, 2012)
Apr 10 2012	Record Requested.
Apr 16 2012	Record received from US Court of Appeals for the the Fourth Circuit (one envelope containing join appendices, including one sealed envelope). Remaining record is on PACER.
Apr 16 2012	Record of the U.S. District Court Eastern District of Virginia - (Richmond) on PACER.
May 1 2012	Order extending time to file response to petition to and including June 11, 2012.
Jun 11 2012	Brief of respondent United States in opposition filed.
Jun 20 2012	Reply of petitioner Allen Ryan Alleyne filed. (Distributed)
Jun 21 2012	DISTRIBUTED for Conference of September 24, 2012.
Oct 1 2012	DISTRIBUTED for Conference of October 5, 2012.
Oct 5 2012	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Oct 31 2012	SET FOR ARGUMENT ON Monday, January 14, 2013.
Nov 19 2012	Joint appendix filed. (Statement of costs filed)
Nov 19 2012	Brief of petitioner Allen Ryan Alleyne filed.
Nov 21 2012	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Nov 26 2012	Brief amicus curiae of New York Council of Defense Lawyers filed.
Nov 26 2012	Brief amicus curiae of Center on the Administration of Criminal Law filed.
Nov 26 2012	Brief amici curiae of Sentencing Project, and The American Civil Liberties Union filed.
Nov 26 2012	Brief amicus curiae of Families Against Mandatory Minimums filed.
Dec 6 2012	CIRCULATED

Dec 19 2012	Brief of respondent United States filed. (Distributed)
Dec 26 2012	Brief amici curiae of Texas, et al. filed. (Distributed)
Jan 7 2013	Reply of petitioner Allen Ryan Alleyne filed. (Distributed)
Jan 14 2013	Argued. For petitioner: Mary E. Maguire, Assistant Federal Public Defender, Richmond, VA. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No. __-_____

IN THE

SUPREME COURT OF THE UNITED STATES

ALLEN RYAN ALLEYNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court's decision in *Harris v. United States*, 536 U.S. 545 (2002), should be overruled.

PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page.

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No. ___-_____

IN THE SUPREME COURT OF THE UNITED STATES

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On Petition for Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals, which is unpublished, appears at pages 1a to 6a of the appendix to the petition and at 2011 WL 6228319 (4th Cir. Dec. 15, 2011).

JURISDICTION

The district court in the Eastern District of Virginia had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over

Petitioner's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. That court issued its opinion and judgment on December 15, 2011. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . . .

In relevant part, 18 U.S.C. § 924(c)(1)(A) provides:

> [A]ny person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –
> (i) be sentenced to a term of imprisonment of not less than 5 years;
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT OF THE CASE

Overview

This petition for a writ of certiorari seeks review of the sentence imposed on Petitioner Allen Ryan Alleyne. Mr. Alleyne was convicted by a jury of one count of robbery affecting interstate commerce, in violation of 18 U.S.C. §§ 1951(a), 2, and one count of using or carrying a firearm during in or in relation to a crime of violence, in violation of 18 U.S.C. § 924(c). The government additionally charged Mr. Alleyne with brandishing a firearm during the robbery, and included that charge on the verdict form, but the jury found Mr. Alleyne not guilty of brandishing. *See* Pet. App. 28a.[1]

At sentencing, the district court imposed a 46-month sentence on the robbery charge. Relevant to this petition, the court, over Mr. Alleyne's objection, imposed a consecutive 84-month sentence for the firearm offense after finding by a preponderance of the evidence that Mr. Alleyne reasonably could have foreseen that his accomplice would brandish a gun during the robbery. Pet. App. 27a; C.A.J.A. 1005.

The Events at Issue

The government alleged that Mr. Alleyne and an accomplice engaged in a holdup robbery of the manager of a convenience store as he drove to make a bank deposit. According to the government's evidence, Mr. Alleyne learned of the store's deposit procedure from his girlfriend, Valencia Jones, who worked at the store (and testified at trial).

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[1] "Pet. App." refers to the appendix attached to this petition. "C.A.J.A." refers to the joint appendix filed in the court of appeals.

Ms. Jones stated that Mr. Alleyne and another man staked out the store and its manager to learn his habits and routes to the bank. On October 1, 2009, the two men followed the manager as he left the store, but then pulled ahead of him and went in the direction of the bank. The store manager came upon their stopped vehicle, thinking they had car trouble. The driver motioned the manager to stop, then walked up to his car. When the manager rolled down the window to see what the problem was, the robber thrust a gun at the manager's neck and demanded the store's deposit bag. The manager handed it over, and the gunman went to the passenger side of his car. During the robbery, the passenger had moved to the driver's side, and when the gunman returned, they drove away. The government alleged that Mr. Alleyne was the man who stayed in the car, although the manager could not identify him. The gunman was not identified at trial or charged for his participation. Ms. Jones received a 30-month sentence for her part in hatching the plan and taking a share of the proceeds.

Proceedings in the District Court

As noted, Mr. Alleyne was charged with a Hobbs Act robbery count and one count under 18 U.S.C. § 924(c). Both counts also referenced 18 U.S.C. § 2. C.A.J.A. 9-10. The trial evidence largely consisted of the testimony of Valencia Jones about her role in the robbery scheme and her claims that Mr. Alleyne was involved, as well as cell-phone records suggesting that Mr. Alleyne was in the vicinity at the time certain events in the robbery occurred. In addition, there was evidence that the vehicle used in the robbery was a rental car with stolen license plates. Mr. Alleyne presented evidence undermining Ms. Jones's

credibility and portions of her story. At the conclusion of the trial, the jury found Mr. Alleyne guilty of robbery and of using and carrying a firearm during the crime, but it found that he did not brandish a weapon. Pet. App. 28a.

At sentencing, the government asked the district court to impose an enhanced 84-month mandatory minimum consecutive sentence because the firearm was brandished, notwithstanding the jury's verdict acquitting Mr. Alleyne of that conduct. C.A.J.A. 957-61. Mr. Alleyne objected on two grounds. First, although he acknowledged that this Court's opinion in *Harris v. United States*, 536 U.S. 545, 556 (2002), held that brandishing was a sentencing factor for the judge to find, in order to preserve the issue for further review Mr. Alleyne argued that *Harris* was inconsistent with this Court's line of cases beginning with *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Second, Mr. Alleyne argued that even under a preponderance of the evidence standard, the government's evidence did not show that Mr. Alleyne reasonably foresaw that a gun would be brandished. Accordingly, Mr. Alleyne contended that the mandatory minimum sentence on the firearm count should be 60 months instead of 84 months. C.A.J.A. 928-31.

During the sentencing hearing, the district court stated, with regard to the jury, that "I think it's fair to say they didn't find brandishing beyond a reasonable doubt because they were told they had to find it beyond a reasonable doubt if they were going to do it." Pet. App. 11a. The court stated, "I don't like the role of being the reverser of juries," but went on to conclude that it was bound by *Harris*. Pet. App. 13a-14a. The court noted that it could, in theory, "avoid the whole problem by finding [the sentencing range to be] five to life and

sentencing him to seven," but expressed that doing so would be "intellectually dishonest." Pet. App. 23a-24a. In line with its role under *Harris*, the court heard argument over whether to apply the enhanced sentence to the facts of this case. Ultimately, the court found, by a preponderance of the evidence, that Mr. Alleyne reasonably foresaw that the gunman would brandish a firearm during the robbery. Pet. App. 27a. As a result, the court imposed an 84-month sentence on the § 924(c) count, consecutive to a 46-month sentence on the robbery count. C.A.J.A. 1005, 1011. Mr. Alleyne filed a timely appeal. C.A.J.A. 1016.

Proceedings in the Court of Appeals

Mr. Alleyne raised three issues on appeal to the United States Court of Appeals for the Fourth Circuit: (1) whether the entirely circumstantial evidence was sufficient to support the jury's verdicts; (2) whether the government or the district court constructively amended or fatally varied from the indictment by charging him as the principal in the robbery but convicting him on an aiding-and-abetting theory; and (3) whether the district court erred, as a constitutional or factual matter, in applying the enhanced sentence for brandishing.[2]

In a brief, unpublished, *per curiam* opinion, issued without oral argument, the court of appeals found that the evidence was sufficient and that neither a constructive amendment nor a fatal variance occurred. Pet. App. 1a-5a; *United States v. Alleyne*, No. 11-4208, 2011 WL 6228319, at *1-*2 (4th Cir. Dec. 15, 2011). With respect to the sentencing issue, the Fourth Circuit first noted that "Supreme Court precedent forecloses any argument that

[2] Although Mr. Alleyne maintains his innocence, the only issue raised in this petition is the sentencing issue.

Alleyne's constitutional rights were violated by the district court's finding that he was accountable for brandishing the firearm despite the jury's finding that he was not guilty of that offense." Pet. App. 6a (citing *Harris*). The court went on to find that the district court's factual findings were not clearly erroneous. *Id.* Accordingly, the Fourth Circuit affirmed Mr. Alleyne's conviction and sentence. *Id.* This timely petition follows.

REASONS FOR GRANTING THE PETITION

THIS COURT SHOULD RECONSIDER ITS DECISION IN *HARRIS V. UNITED STATES*

I. *Harris* Is an Incompatible Outlier From the *Apprendi* Line of Decisions

In the court of appeals, Mr. Alleyne challenged the district court's application of a seven-year mandatory minimum sentence to his conviction under 18 U.S.C. § 924(c). The Fourth Circuit rejected the claim, without discussion, by citing this Court's decision in *Harris*. Pet. App. 6a. Although the lower court lacked the power to overturn that ruling, the time has come for this Court to do so.

In *Harris*, the Court considered whether Sixth Amendment protections applied to a factual finding that increased the defendant's mandatory minimum sentence from five to seven years. 536 U.S. at 550-51. Relying on this Court's earlier decision in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), a plurality of four Justices reasoned that facts raising the sentencing floor are constitutionally different from facts raising the ceiling, such that only the latter need be treated as elements. *See Harris*, 536 U.S. at 557. Four dissenters

maintained that *Apprendi*'s principles apply with equal force to maximum and minimum sentences alike. *See id.* at 572-83 (Thomas, J., dissenting).

Justice Breyer cast the deciding vote. He agreed with the dissent that no constitutional or even "logic[al]" distinction can be drawn between factual findings that raise sentencing minimums and those that raise sentencing maximums. *Harris*, 536 U.S. at 569. He concurred in the plurality's judgment, however, on the ground that he did not "yet" accept the *Apprendi* rule. *Id.* Eight years later, however, in considering *United States v. O'Brien*, 130 S. Ct. 2169 (2010), Justice Breyer suggested that the time has come to revisit *Harris* and to apply the Sixth Amendment to mandatory minimums, explaining that he continues to believe that "*Apprendi* does apply to mandatory minimums" and *Apprendi* has now been "the law . . . for some time." *O'Brien*, 130 S. Ct. at 2183 n.6 (Stevens, J., concurring) (quoting Justice Breyer's comment at oral argument). This Court did not reach the issue, however, because it ruled as a matter of statutory construction that the provision at issue was an element.[3]

Justice Breyer and the four dissenting Justices in *Harris* were correct in perceiving the logical and practical inconsistency of the plurality's position. A strict distinction between maximum and mandatory minimum sentences cannot be reconciled with the rule of *Apprendi* that the Constitution's indictment, jury, and proof guarantees apply to all "facts that increase

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[3] Justice Thomas would have reached the issue and held, in accordance with his dissent in *Harris*, that "[i]f a sentencing fact either raises the floor or raises the ceiling of a range of punishments to which a defendant is exposed, it is, by definition, [an] elemen[t]." *O'Brien*, 130 S. Ct. at 2184 (Thomas, J., concurring in the judgment) (quotation omitted).

the prescribed range of penalties to which a criminal defendant is exposed." *O'Brien*, 130 S. Ct. at 2174 (quoting *Apprendi*, 530 U.S. at 490) (in turn quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring))) (emphasis added); *id.* at 2182 (Stevens, J., concurring) (same).

Justice Thomas has repeatedly and cogently explained that this constitutional requirement must apply "to sentencing facts that . . . 'alter the defendant's statutorily mandated sentencing range, by increasing the mandatory minimum sentence.'" *Id.* at 2184 (Thomas, J., concurring) (citation omitted). "Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). In *O'Brien*, Justice Stevens joined Justice Thomas in expressly calling for *Harris* to be overruled, agreeing that no meaningful distinction can be drawn between facts that increase the bottom of a statutory sentencing range and facts that increase its top. *O'Brien*, 130 S. Ct. at 2183. Justice Kennedy has likewise recognized that "[o]nce the facts triggering application of the mandatory minimum are found by the judge, the sentencing range to which the defendant is exposed is altered." *Jones*, 526 U.S. at 268 (Kennedy, J., dissenting) (rejecting, prior to *Apprendi*, position that such facts are subject to Constitution's indictment, jury and proof requirements).

Facts triggering a mandatory minimum sentence "warrant constitutional safeguards" because as "a matter of common sense, an increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense." *O'Brien*, 130

S. Ct. at 2184 (Thomas, J., concurring) (citation omitted). It is the mandatory minimum that bars the defendant from calling upon the sentencing judge to take full account of mitigating circumstances, a prohibition that should itself be recognized as punishment, at least for *Apprendi* purposes. *See Harris*, 536 U.S. at 569-70 (Breyer, J., concurring) (observing that "statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency"). And in the § 924(c)(1) context, as the Court has recognized, the mandatory sentencing provisions effectively increase the sentence that the defendant would otherwise receive, as judges overwhelmingly impose the mandatory minimum and nothing more. *See O'Brien*, 130 S. Ct. at 2177-78 (considering seven-year minimum for brandishing); *Harris*, 536 U.S. at 578 (Thomas, J., dissenting).

Since it decided *Apprendi*, this Court has taken up numerous cases to address the scope of its constitutional rule.[4] *Harris* is the clear outlier among these decisions. The

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[4] *See, e.g.*, *Southern Union Co. v. United States*, No. 11-94, 132 S. Ct. 756 (2011) (granting certiorari to consider whether *Apprendi* applies to imposition of criminal fines); *O'Brien*, 130 S. Ct. at 2178 (avoiding addressing *Apprendi*'s constitutional rule by applying principles of statutory construction to find that whether firearm is a machinegun is element of offense, rather than sentencing factor); *Oregon v. Ice*, 555 U.S. 160, 168-69 (2009) (holding that *Apprendi* does not require facts triggering consecutive sentences to be found by a jury); *Cunningham v. California*, 549 U.S. 270, 274-75 (2007) (reaffirming *Apprendi* as applied to California's determinate sentencing law); *United States v. Booker*, 543 U.S. 220, 243-44 (2005) (reaffirming *Apprendi* as applied to federal sentencing guidelines); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) (clarifying that "statutory maximum" for purposes of *Apprendi* is maximum sentence a judge may impose without additional factual findings); *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002) (applying *Apprendi* to capital sentencing); *Harris*, 536 U.S. at 568 (holding that *Apprendi* does not apply to facts triggering mandatory minimum sentences); *United State v. Cotton*, 535 U.S. 625, 630-31 (2002) (holding that defective indictment under *Apprendi* does not deprive court of jurisdiction).

incompatibility between *Harris* and the *Apprendi* line of cases has been noted by several lower courts. *See, e.g., United States v. Krieger*, 628 F.3d 857, 867-69 (7th Cir. 2010) (noting that "[t]he thread by which *McMillan* hangs may be precariously thin" and that "it is difficult to reconcile *McMillan* with *Apprendi*"), *cert. denied*, 132 S. Ct. 139 (2011); *United States v. Tidwell*, 521 F.3d 236, 521 & n.11 (3d Cir. 2008) (noting that "distinguishing *Apprendi* from *McMillan* and *Harris*" is a "difficult task"); *United States v. Grier*, 475 F.3d 556, 575 (3d Cir.2007) (Ambro, J., concurring) ("To create a sentencing process that fully carries through on the promise of *Apprendi* and *Blakely*, I believe the Supreme Court would have to overrule at least, *McMillan* and *Harris*.") (citations omitted); *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) ("We agree that *Harris* is difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence . . . ."); *United States v. Gonzalez*, 420 F.3d 111, 126 (2d Cir. 2005) ("The logic of the distinction drawn in *Harris* between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped."); *see also United States v. Washington*, 462 F.3d 1124, 1140 (9th Cir. 2006); *United States v. Barragan-Sanchez*, 165 F. App'x 758, 760 (11th Cir. 2006); *United States v. Jones*, 418 F.3d 726, 731 (7th Cir. 2005); *United States v. Arias*, 409 F. Supp. 2d 281, 299 n.10 (S.D.N.Y. 2005); *United States v. Emmenegger*, 329 F. Supp. 2d 416, 432 n.15 (S.D.N.Y. 2004).

As the Fourth Circuit acknowledged in Mr. Alleyne's case, the district courts and courts of appeals are bound by *Harris*. Nevertheless, they continue to recognize its fundamental flaws. Only this Court can harmonize this line of authority, and it can only do

so by overruling *Harris*. The tension between *Apprendi* and *Harris* is too pronounced to be tolerated. As Justice Breyer appears to have contemplated at oral argument in *O'Brien*, the plurality decision in *Harris* is ripe to be revisited.

II. This Case Presents an Ideal Vehicle for Overruling *Harris*

Mr. Alleyne's case offers this Court an excellent vehicle to reconsider and overturn *Harris* for three reasons. First, the issue has been preserved and litigated by both parties in the lower courts. The brandishing allegation was charged in the indictment, C.A.J.A. 9-10, argued by the government to the jury, C.A.J.A. 840, included in the district court's instructions to the jury, C.A.J.A. 888, 914-21, listed in a special verdict form, Pet. App. 28a, and addressed at sentencing, Pet. App. 9a-27a. Because the jury acquitted Mr. Alleyne of brandishing, Pet. App. 28a, there can be no contention that the evidence was sufficient to prove it beyond a reasonable doubt. *See* Pet. App. 11a (district court noting that jury did not find brandishing beyond a reasonable doubt); *cf. Cotton*, 535 U.S. at 633 (finding that evidence showing drug quantity was "overwhelming" and "essentially uncontroverted"). Mr. Alleyne preserved the issue in his appeal to the Fourth Circuit, where that court acknowledged that it was governed by *Harris*. Pet. App. 6a. The fact that the jury rejected the government's plea to find Mr. Alleyne guilty of brandishing, only to have the district court apply the increased mandatory minimum sentence anyway, places this case in the perfect posture for this Court to revisit the *Harris* decision.

Second, this case is on all fours with *Harris*, should the Court wish to use a firearm case to overrule its prior decision. As in *Harris*, the sentencing court applied the increased

sentence for brandishing provided in § 924(c)(1)(A)(ii). Under § 924(c), a finding of brandishing or discharging increases the mandatory minimum, but the maximum remains the same as in the unenhanced penalty. Accordingly, because this case only involves the "floor," rather than the "ceiling," it presents the issue in a cleaner fashion than, for example, a drug case where a finding affects both the minimum and maximum sentence. *See, e.g., Krieger*, 628 F.3d at 866-67 (considering whether "death resulting" in drug distribution case is an element or sentencing factor, where a finding that death resulted increased both minimum and maximum sentence).

Third, it is clear from the record that the district court only applied the seven-year mandatory minimum because it found facts by a preponderance standard, as countenanced in *Harris*. The court stated that it did not "like the role of being the reverser of juries." Pet. App. 13a. Thus, the court understood the primacy of the jury's role that is at the heart of *Apprendi* and its progeny. The court only made the necessary factual finding on its own because *Harris* required it. *See* Pet. App. 23a-24a (remarking that it would be "intellectually dishonest" to "avoid the whole problem by finding [the sentencing range to be] five to life and sentencing him to seven"). After the court found that a mandatory minimum sentence of seven years applied, it sentenced Mr. Alleyne to the bare minimum.[5] C.A.J.A. 1005. This is consistent with this Court's acknowledgment that virtually every defendant subject to a mandatory minimum sentence under § 924(c)(1)(A) receives the minimum sentence, despite

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[5] In addition, the 46-month sentence the court imposed on the robbery count represented the low end of the applicable guideline range. C.A.J.A. 969, 1005.

a theoretical maximum of life. *See O'Brien*, 130 S. Ct. at 2177-78; *see also Harris*, 536 U.S. at 578 (Thomas, J., dissenting). On this record, there is no reason to believe that the district court would impose an 84-month sentence, let alone any sentence above 60 months, if the brandishing enhancement did not apply. Therefore, the issue is dispositive in this case, and likely to lead to significant relief for Mr. Alleyne if the Court rules in his favor.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 14, 2012

OPPOSITION BRIEF

No. 11-9335

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v.

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ON PETITION FOR A WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Harris v. United States, 536 U.S. 545 (2002), should be overruled.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter but is available at 2011 WL 6228319.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2011. The petition for a writ of certiorari was filed on March 14, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for

the Eastern District of Virginia, petitioner was convicted of robbery affecting interstate commerce, in violation of 18 U.S.C. 1951(a) and 2, and using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2. Judgment 1. He was sentenced to a total of 130 months of imprisonment, to be followed by five years of supervised release. Id. at 2-3. The court of appeals affirmed. Pet. App. 1a-6a.

1. In August 2009, petitioner's girlfriend, who worked at a convenience store, suggested a plan to rob the store's manager as he drove the store's daily deposits to a local bank. Gov't C.A. Br. 7. She provided petitioner with extensive information about the store's operations, and petitioner and an accomplice (who was not identified at trial) spent several days surveilling it. Id. at 7-9. Petitioner accompanied his girlfriend to rent a car for use in the robbery. Id. at 9-12.

On October 1, 2009, petitioner and the accomplice waited for the manager to leave the store with the day's deposits, then positioned their rental car on the side of the road ahead of him. Gov't C.A. Br. 13. As the manager's van approached, petitioner's accomplice got out of the rental car and made it appear as though he and petitioner were experiencing car trouble. Id. at 13-14. He then walked towards the manager's van and gestured for the manager to roll down his window. Id. at 14. When he reached the van, petitioner's accomplice pulled out a semi-automatic pistol, pushed

it up against the manager's throat, and demanded the bag containing the bank deposits. Ibid. The manager complied, handing over a total of $13,201. Id. at 13-14. After the robbery, petitioner sped away in the rental car with the accomplice in the passenger seat. Id. at 14.

2. A grand jury in the Eastern District of Virginia indicted petitioner on one count of robbery affecting interstate commerce, in violation of 18 U.S.C. 1951(a) and 2, and one count of "us[ing], carry[ing], brandish[ing], and possess[ing]" a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1) and 2. Indictment 1-2. The jury, which was instructed that it could find petitioner guilty either as a principal or on an aiding-and-abetting theory, convicted petitioner on both counts. Pet. App. 28a; see 9/3/10 Tr. 840-842; 9/7/10 Tr. 868-871.

The verdict form asked the jury, if it convicted petitioner on the firearm count, to determine whether he "[u]sed or carried a firearm during and in relation to a crime of violence," "[p]ossessed a firearm in furtherance of a crime of violence," or "[b]randished a firearm in connection with the crime of violence." Pet. App. 28a. In response to questions from the jury during deliberations, the court instructed the jury that it had to find "at least one" of the these in order to convict petitioner on the firearm count, but that it could "check yes to all three," so long as the jurors were unanimous about whatever they selected. 9/7/10

Tr. 872-873. The jury selected only "[u]sed or carried a firearm during and in relation to a crime of violence." Pet. App. 28a.*

3. The presentence investigation report (PSR) calculated an advisory Sentencing Guidelines range of 46 to 57 months of imprisonment on the robbery count. PSR ¶ 80. Petitioner's conviction on the firearm count required a mandatory-minimum sentence, consecutive to any sentence on the robbery count. 18 U.S.C. 924(c)(1)(A); see Abbott v. United States, 131 S. Ct. 18, 23 (2010). The default length of that consecutive mandatory-minimum sentence is five years, but increases to seven years if the firearm was brandished. 18 U.S.C. 924(c)(1)(A)(i)-(ii). The PSR stated that petitioner was subject to the seven-year mandatory minimum. PSR Addendum 1.

Petitioner objected to the imposition of a seven-year mandatory minimum, contending that the court lacked constitutional authority to find that he aided and abetted the brandishing of a firearm during the robbery and that, in any event, the evidence did not support a finding that he knew his accomplice would brandish a gun. Dkt. # 72 at 2 n.1; Pet. App. 14a-18a. Petitioner acknowledged, however, that the former argument was foreclosed by Harris v. United States, 536 U.S. 545 (2002), in which this Court

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* Petitioner erroneously states (Pet. 5) that the jury "found that [petitioner] did not brandish a weapon." In light of the instructions, the verdict form may simply reflect the jury's failure to reach complete unanimity on the brandishing issue.

held that brandishing of a firearm under Section 924(c)(1)(A)(ii) is a sentencing factor that can constitutionally be found by the sentencing judge. Dkt. # 72 at 2 n.1.

The district court concluded that "the decision in Harris combined with the evidence in this case calls for the overruling of the objection." Pet. App. 26a. It reasoned that "brandishing is a sentencing factor * * * to be determined by a preponderance of the evidence"; that the "preponderance of the evidence here would support a finding that the defendant aided and abetted the brandishing that actually, undeniably, and undisputedly occurred"; and that "[a]lthough the jury did not find beyond a reasonable doubt that the defendant reasonably foresaw his co-conspirator brandishing a firearm for the express purpose of intimidation, the Court is not precluded from finding by the lower preponderance of the evidence that he did." Id. at 26a-27a. The court sentenced petitioner to a 46-month term of imprisonment on the robbery count and a consecutive 84-month (seven-year) term of imprisonment on the firearm count. Id. at 27a; Judgment 2.

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-6a. The court held, as petitioner again conceded, that Harris foreclosed a constitutional challenge to the enhanced sentence on the firearm count. Pet. App. 6a; see Pet. C.A. Br. 33.

ARGUMENT

Petitioner contends (Pet. 7-14) that this Court should overrule its holding in Harris v. United States, 536 U.S. 545 (2002), that a sentencing court may constitutionally find facts, by a preponderance of the evidence, that increase a defendant's minimum sentence within an authorized range. The Court has repeatedly and recently denied petitions arguing that Harris should be overruled or asserting that Harris already has been overruled implicitly. See, e.g., Crayton v. United States, No. 11-8749, 2012 WL 443758 (May 14, 2012); Krieger v. United States, 132 S. Ct. 139 (2011) (No. 10-10392); Booker v. United States, 131 S. Ct. 1001 (2011) (No. 10-6999); Berroa v. United States, 131 S. Ct. 637 (2010) (No. 09-11362); Benford v. United States, 130 S. Ct. 3322 (2010) (No. 09-8674). There is no reason for a different result here.

1. In McMillan v. Pennsylvania, 477 U.S. 79 (1986), this Court upheld the constitutionality of a sentencing provision under which a person convicted of a specified felony was subject to a mandatory-minimum penalty of five years of imprisonment if the sentencing judge found, by a preponderance of the evidence, that the person visibly possessed a firearm while committing the offense. Id. at 80-94. The Court held that due process did not require the State to treat visible possession as an element of the offense or to prove its existence beyond a reasonable doubt. Id.

at 84-93. The Court also held that the Sixth Amendment did not require that visible possession be found by the jury at trial. Id. at 93. The Court explained that the provision "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." Id. at 87-88.

Sixteen years later, in Harris, the Court "[r]eaffirm[ed] McMillan." 536 U.S. at 568. In Harris, as in this case, a district court imposed a mandatory-minimum seven-year term of imprisonment under 18 U.S.C. 924(c)(1)(A)(ii) based on a judicial determination that a firearm had been brandished during the commission of an offense. 536 U.S. at 551. This Court first concluded, as a statutory matter, that Section 924(c)(1)(A) "regards brandishing * * * as [a] sentencing factor[]" and not as an element of a separate, graduated offense. Id. at 556; see also United States v. O'Brien, 130 S. Ct. 2169, 2180 (2010) ("[T]he brandishing and discharge provisions codified in § 924(A)(ii) and (iii) do state sentencing factors."). The Court additionally concluded, as a constitutional matter, that "[b]asing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments." Harris, 536 U.S. at 568. The Court explained

that by increasing the minimum sentence on that basis, "Congress 'simply took one factor that has always been considered by sentencing courts to bear on punishment and dictated the precise weight to be given that factor.'" Ibid. (quoting McMillan, 477 U.S. at 89-90) (alterations omitted). That sentencing factor, the Court held, "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." Ibid.; see id. at 565, 567-568 (plurality opinion); id. at 569-570, 572 (Breyer, J., concurring in part and concurring in the judgment).

The Court in Harris adhered to McMillan notwithstanding the defendant's argument that McMillan had been superseded by Apprendi v. New Jersey, 530 U.S. 466 (2000). See Harris, 536 U.S. at 557 (plurality opinion). In Apprendi, the Court had held that other than a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490; see, e.g., Cunningham v. California, 549 U.S. 270, 282 (2007). The plurality in Harris observed that Apprendi had expressly declined to overrule McMillan, in favor of simply "limit[ing] [McMillan's] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict -- a limitation identified in the McMillan opinion itself." Apprendi, 530 U.S. at 487 n.13 (cited at Harris, 536 U.S. at 563 (plurality opinion)).

The plurality in Harris explained in detail the reasons for distinguishing between facts that increase the maximum sentence to which a defendant is exposed and facts that merely bear on the choice of sentences within the range permitted by the jury's verdict. Harris, 536 U.S. at 556-568 (plurality opinion). Whereas Apprendi had held that judicial determination of the former type of facts would contravene the "prevailing historical practice" that formed the backdrop for the Fifth and Sixth Amendments, "[t]here [i]s no comparable historical practice of submitting facts increasing the mandatory minimum to the jury." Id. at 563. To the contrary, "[j]udges * * * have always considered uncharged 'aggravating circumstances' that, while increasing the defendant's punishment, have not 'swelled the penalty above what the law has provided for the acts charged.'" Id. at 562 (plurality opinion) (quoting 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure § 85, p. 54 (2d ed. 1872)) (brackets omitted). Accordingly, the Fifth and Sixth Amendments "ensure that the defendant 'will never get more punishment than he bargained for when he did the crime,' but they do not promise that he will receive 'anything less' than that." Id. at 566 (plurality opinion) (quoting Apprendi, 530 U.S. at 498 (Scalia, J., concurring)).

2. Petitioner offers no persuasive reason for the Court to again revisit application of the Fifth and Sixth Amendments to judicial factfinding in the context of a statutory mandatory

minimum. Petitioner's core argument -- that a "strict distinction between maximum and mandatory minimum sentences cannot be reconciled with the rule of Apprendi," Pet. 8 -- did not prevail in Harris, and the stare decisis considerations that supported that decision have only gathered force with the passage of time.

As petitioner notes (Pet. 10 & n.4), this Court has "taken up numerous cases" over the past decade "to address the scope of" Apprendi. But those cases reinforce, rather than undermine, Harris and McMillan. Those decisions have consistently distinguished judicial factfinding that raises the minimum term within the existing range from judicial factfinding that increases the maximum sentence to which a defendant is exposed. In Blakely v. Washington, 542 U.S. 296 (2004), for example, this Court extended Apprendi to invalidate a sentencing enhancement, under a state sentencing guidelines scheme, that produced "a sentence greater than what state law authorized on the basis of the verdict alone." Id. at 305. The Court distinguished McMillan on the ground that it "involved a sentencing scheme that imposed a statutory minimum if a judge found a particular fact." Id. at 304; see id. at 304-305 (citing Harris). Likewise, in Ring v. Arizona, 536 U.S. 584 (2002), the Court reiterated that Apprendi applies only to "elevation of the maximum punishment," while "the distinction between elements and sentencing factors continues to be meaningful as to facts increasing the minimum sentence" under Harris. Id. at

604 & n.5; see also Rita v. United States, 551 U.S. 338, 373 n.2 (2007) (Scalia, J., concurring in part and concurring in the judgment) (recognizing that "eliminating discretion to impose low sentences is the equivalent of judicially creating mandatory minimums, which are not a concern of the Sixth Amendment" and citing Harris).

Petitioner highlights (Pet. 8-9) this Court's statement in United States v. O'Brien that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." 130 S. Ct. at 2174 (quoting Apprendi, 530 U.S. at 490) (brackets omitted). But that statement is a verbatim quotation from Apprendi and reflects no post-Apprendi change in the law. O'Brien followed up the statement by explaining that while "judge-found sentencing factors cannot increase the maximum sentence a defendant might otherwise receive based purely on the facts found by the jury," id. at 2175, "sentencing factors may guide or confine a judge's discretion in sentencing an offender 'within the range prescribed by statute,'" id. at 2174-2175 (quoting Apprendi, 530 U.S. at 481). And the holding of O'Brien -- that a weapon's status as a machinegun under 18 U.S.C. 924(c)(1)(B)(ii) is an element of an offense, rather than a sentencing factor, id. at 2180 -- was purely statutory and did not expand upon Apprendi.

3. Principles of stare decisis strongly counsel against revisiting Harris and McMillan . "Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212 (1984). No "special justification" exists here. McMillan and Harris offend no historical practices; they are consistent with the rule of Apprendi; and a rule permitting legislatures to increase minimum sentences within an authorized range based on judge-found facts is clear and workable.

Stare decisis, moreover, "has special force when legislators or citizens have acted in reliance on a previous decision, for in th[at] instance overruling the decision would * * * require an extensive legislative response." Hubbard v. United States, 514 U.S. 695, 714 (1995) (opinion of Stevens, J.) (internal quotation marks and citation omitted). Even at the time Harris was decided, "[l]egislatures and their constitutents" had already "relied upon McMillan to exercise control over sentencing through dozens of statutes like the one the Court approved in that case." Harris, 536 U.S. at 567-568 (plurality opinion); see id. at 570 (Breyer, J., concurring in part and concurring in the judgment) (recognizing that "[d]uring the past two decades, * * * mandatory minimum sentencing statutes have proliferated in number and importance"); see also Apprendi, 530 U.S. at 487 n.13 (noting the "likelihood

that legislative decisions may have been made in reliance on McMillan"). That reliance has only increased in the decade since Harris. See, e.g., Prevention of Terrorist Access to Destructive Weapons Act of 2004, Pub. L. No. 108-458, Tit. VI, Subtit. J, §§ 6903-6906, 118 Stat. 3770-3773 (adding mandatory-minimum sentences). It would be even more disruptive now than it would have been in Harris to "overturn those statutes or cast uncertainty upon the sentences imposed under them." Harris, 536 U.S. at 568 (plurality opinion).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2012

REPLY BRIEF

No. 11-9335

IN THE

SUPREME COURT OF THE UNITED STATES

ALAN RYAN ALLEYNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO CERTIORARI

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ARGUMENT

In its brief in opposition, the government offers several reasons why the Court should deny certiorari in Allen Alleyne's case. None of the government's reasons are persuasive. This Court should grant the writ of certiorari and use this case as a vehicle to overturn *Harris v. United States*, 536 U.S. 545 (2002).

1. The bulk of the government's brief is a defense of the four-Justice plurality decision in *Harris*. Br. in Opp. 6-11. Of course, five Justices disagreed with that reasoning in *Harris* itself, *see* 536 U.S. at 572-83 (Thomas, J., dissenting); 536 U.S. at 569-72 (Breyer, J., concurring in part and concurring in the judgment), and the plurality's reasoning has never

been adopted by a majority of the Court. Moreover, numerous lower courts continue to express frustration over the incompatibility of *Harris* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny. *See* Pet. 11.

The government cites several of this Court's recent cases for the proposition that they "reinforce" *Harris* and its predecessor, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). Br. in Opp. 10. However, language in those opinions is more properly characterized as merely descriptive of the holding in *Harris*; the Court has not yet taken another case raising the precise issue in *Harris* and Petitioner's case. For instance, the government argues that, even after *Apprendi*, there remains a constitutionally-valid distinction between elements of offenses and so-called "sentencing factors." Br. in Opp. 10-11 (citing *Ring v. Arizona*, 536 U.S. 584, 604 n.5 (2002)). But the cited footnote in *Ring* only reports the result in *Harris*, which was decided the same day, and does not adopt the *Harris* plurality's reasoning.

Further, the government's reliance on the difference between elements and sentencing factors begs the question by assuming that brandishing is the latter. Even if these labels continue to have some significance in determining legislative intent, *see United States v. O'Brien*, 130 S. Ct. 2169, 2180 (2010), they are not controlling for purposes of adhering to the constitutional rule that any fact which increases the prescribed range of penalties must be charged in an indictment and either admitted by the defendant or proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490 (holding that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range

of penalties to which a criminal defendant is exposed" and that "[i]t is equally clear that such facts must be established by proof beyond a reasonable doubt") (quotation omitted).

In addition, what *Apprendi* makes plain, and where *Harris* goes astray, is that over-ruling a jury and imposing a punishment greater than that authorized by the jury's verdict is a violation of due process. *See Apprendi*, 530 U.S. at 484-90; *In re Winship*, 397 U.S. 358, 364 (1970). In other words, the mandatory minimums under 18 U.S.C. § 924(c) "increase the prescribed range of penalties" and therefore should be found by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490; *O'Brien*, 130 S. Ct. at 2182-2183 (Stevens, J., concurring). An "increased mandatory minimum heightens the loss of liberty and represents the increased stigma society attaches to the offense," and thus, "facts that trigger an increased mandatory minimum sentence warrant constitutional safeguards." *Harris*, 536 U.S. at 578 (Thomas, J, dissenting); *see also O'Brien*, 130 S. Ct. at 2177 (noting potential unfairness in treating machinegun provision as a sentencing factor rather than as an element).

No decision of this Court since *Harris* has done anything to make it compatible with the *Apprendi* rule. Instead, later cases have only reinforced the fact that *Harris* does not align with fundamental notions of due process. The time has come for this Court to reconcile its jurisprudence in the only way possible, by overruling *Harris*.

2. As the government is incapable of harmonizing *Harris* and *Apprendi*, it falls back on the doctrine of *stare decisis* in arguing that certiorari should be denied. Br. in Opp. 12-13. To begin, the government recognizes, as it must, that *stare decisis* carries less force in constitutional cases. Br. in Opp. 12 (citing *Arizona v. Rumsey*, 467 U.S. 203, 212

(1984)). The doctrine should hold even less sway here, where the holding in question is a plurality opinion that is an outlier from a pre-existing body of authority. Moreover, this Court has not shied from the obligation of overruling its prior decisions "where the necessity and propriety of doing so has been established." *Ring*, 536 U.S. at 608 (quotation omitted).

Ring is a perfect example. In order to apply the *Apprendi* rule, the Court overruled *Walton v. Arizona*, 497 U.S. 639 (1990), which had permitted judges to find aggravating factors necessary for the imposition of the death penalty. *Ring*, 536 U.S. at 609 (noting that "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury") (citing *Apprendi*, 530 U.S. at 494 n.19). The government asserts that *Harris* has created settled expectations this Court should not upend. Br. in Opp. 12-13. Yet the government fails to acknowledge that lower courts continue to chafe at the incompatibility of *Harris* and *Apprendi*. *See* Pet. 11. In addition, *Harris* is not even as "settled" as *Walton* was when *Ring* overruled it.

As this Court has stated many times, *stare decisis* is not "an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991) (overruling *Booth v. Maryland*, 482 U.S. 496 (1987), and *South Carolina v. Gathers*, 490 U.S. 805 (1989)). In *Payne*, the Court noted that the decisions it was overturning "were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions" and that "[t]hey have been questioned by Members of the Court in later decisions, and have defied consistent application by the lower courts." *Id.* at 828-30. The same is no less true of *Harris*, which did not even

have a majority opinion. Whatever force the doctrine of *stare decisis* has, it is at its weakest here, and should not dissuade the Court from granting the writ and overruling *Harris*.

3. The government suggests obliquely that legislatures have somehow relied on *Harris* in passing new mandatory minimum sentences. Br. in Opp. 13. First, this ignores the fact that most statutes carrying mandatory minimum sentences, including 18 U.S.C. § 924(c), under which both Petitioner and the defendant in *Harris* were convicted, pre-date that decision. Also, it is far from clear that the mandatory minimum sentence provisions in the terrorism and destructive-device statutes the government cites are *Harris*-style sentencing factors, as opposed to *O'Brien*-style elements (even assuming that distinction makes a constitutional difference).

Most importantly, overruling *Harris* would not bar legislatures from creating mandatory minimum sentences. It would simply require that the facts necessary for imposing them be charged in an indictment and either admitted by the defendant or proven to a jury beyond a reasonable doubt. The government and the courts already apply this rule with regard to the unadorned five-year mandatory minimum sentence under § 924(c); it would be no great burden to require the same for imposition of the seven- or ten-year mandatory minimums for brandishing or discharging the firearm. The proof of this proposition is that the government attempted to do as much in Mr. Alleyne's case: the brandishing allegation was charged in the indictment, C.A.J.A. 9-10, and included in the verdict form, Pet. App. 28a. The jury failed to find brandishing beyond a reasonable doubt, and courts should not put themselves in the position of second-guessing the jury's verdict. Therefore, under

Apprendi, the district judge should not have been permitted to find, by a mere preponderance, "facts that increase[d] the prescribed range of penalties to which [Petitioner was] exposed." 530 U.S. at 490; *see also O'Brien*, 130 S. Ct. at 2174.

CONCLUSION

The plurality decision in *Harris* is an outlier from the *Apprendi* line of cases. Neither *stare decisis* nor any other doctrine counsel in favor of sustaining it any longer. Mr. Alleyne's case presents an ideal vehicle for reconciling these conflicting precedents by overruling *Harris*. For the reasons given above, as well as those presented in the petition, the Court should grant the petition for a writ of certiorari.

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June 20, 2012

JOINT APPENDIX

No. 11-9335

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In The Supreme Court of the United States

ALLEN RYAN ALLEYNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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UNITED STATES v. ALLEYNE

RELEVANT DOCKET ENTRIES

United States District Court
Eastern District of Virginia – (Richmond)

CRIMINAL DOCKET FOR
CASE #: 3:10-cr-00134-REP-1

04/14/2010	–	ORAL ORDER APPOINTING FEDERAL PUBLIC DEFENDER as to Allen Ryan Alleyne Mary Elizabeth Maguire for Allen Ryan Alleyne appointed.. Signed by Magistrate Judge Dennis W. Dohnal on 04/14/10. (dtho,) [3:10-mj-00150-DWD] (Entered: 04/16/2010)
		* * *
05/05/2010	8	INDICTMENT as to Allen Ryan Alleyne (1) counts 1-2. (Attachment: (1) Criminal Cover Sheet) (cgar) (Entered: 05/06/2010)
		* * *
09/01/2010	60	Minute Entry for proceedings held before District Judge Robert E. Payne: Michael Gill, AUSA. Kevin Driscoll, Esquire. Deft. with counsel, Mary Maguire, Esquire, Nia Vidal, Esq. Jurors appeared examined on voir dire and empaneled to try case. The Court ordered that lunch be provided for the jurors today. Opening statements made. Govt. adduced evidence. Lunch recess had. Govt.

continued to adduce evidence. Ju[r]ors sent home at 5:25 p.m. to return tomorrow at 9:30 a.m. for further trial proceedings. Court adjourned at 5:30 p.m. Deft. remanded to custody. Jury Trial as to Allen Ryan Alleyne held on 9/1/2010 (Court Reporter Gil Halasz, OCR.) (sneal,) (Entered: 09/02/2010)

* * *

09/02/2010 62 Minute Entry for proceedings held before District Judge Robert E. Payne: Michael Gill, AUSA. Kevin Driscoll, Esquire. Deft. with counsel, Mary Maguire, Esq. and Nia Vidal, Esquire. Jurors appeared, all present. Govt. continued to adduce evidence. Lunch recess had. Govt. continued to adduce evidence. Jurors sent home at 5:40 p.m. to return tomorrow for further trial proceedings. Court adjourned at 5:45 p.m. Deft. remanded to custody. Bench Trial as to Allen Ryan Alleyne held on 9/2/2010 (Court Reporter Gil Halasz, OCR.) (sneal,) (Entered: 09/03/2010)

* * *

09/03/2010 64 Minute Entry for proceedings held before District Judge Robert E. Payne: Michael Gill, AUSA. Kevin Driscoll, Esq. Mary Maguire, Esq., Nia Vidal, Esq. Jurors appeared;all present. Govt. continued to adduce

evidence; rested. Deft's Rule 29 Motion heard; arguments had. Motion denied. Deft. adduced evidence; rested. Deft's Renewed Rule 29 Motion heard; arguments had. Motion denied. Lunch recess had. The Court ordered that lunch be provided for the jurors. Closing arguments had. Jurors charged by the Court. No objections to the charge. Jurors retired at 6:15 to begin deliberations. Alternate jurors discharged subject to recall. Jurors discharged at 8:15 p.m. to return on 9/7/2010 at 9:00 a.m. to continue deliberations. Deft. remanded to custody. Jury Trial as to Allen Ryan Alleyne held on 9/7/2010 (Court Reporter Peppy Peterson, OCR.) (sneal,) Modified on 9/7/2010 (sneal,). (Entered: 09/07/2010)

09/07/2010 65 Minute Entry for proceedings held before District Judge Robert E. Payne: Michael Gill, AUSA. Kevin Driscoll, Esquire.Deft. with counsel, Mary Maguire, Esquire and Nia Vidal, Esquire. Jurors appear[e]d all present. Jurors retired to continue deliberations at 9:10 a.m. Questions rec'd from the jurors and answered in Open Court. The Court ordered that lunch be provided for the jurors. Jury returned at 4:35 p.m. with a verdict finding the defendant guilty as to Counts 1 and 2 of the indictment. Jurors discharged. PSR ordered, SGO

		entered and deft. remanded pending sentencing set at 11:00 a.m. on December 10, 2010. Jury Trial as to Allen Ryan Alleyne held on 9/7/2010 (Court Reporter Peppy Peterson, OCR.) (sneal,) (Entered: 09/08/2010)
09/07/2010	67	JURY VERDICT as to Allen Ryan Alleyne (1) Guilty on Count 1,2. (sneal,) (Entered: 09/08/2010)

* * *

01/07/2011	72	OBJECTION TO PRESENTENCE INVESTIGATION REPORT by Allen Ryan Alleyne (Maguire, Mary) (Entered: 01/07/2011)
01/14/2011	73	Position on Sentencing by Allen Ryan Alleyne (Attachments: # 1 Exhibit Family Letters)(Vidal, Nia) (Entered: 01/14/2011)
01/17/2011	74	Position on Sentencing by USA as to Allen Ryan Alleyne *and Response to Defendant's Objection* (Gill, Michael) (Entered: 01/17/2011)
01/28/2011	75	Minute Entry for proceedings held before District Judge Robert E. Payne: Michael Gill, AUSA. Deft. with counsel, Mary Maguire, Esq. and Nia Vidal, Esq. Deft's Objection to PSR overruled. Arguments had by counsel on sentencing. Deft. made statements. Sentencing held on 1/28/2011 for Allen Ryan Alleyne (1), Count(s) 1, Imprisonment for a term of 46 months; placed on Supervised

		Release for a term of 3 years; $100.00 Special Assessment; $13,201.99 Restitution; Count(s) 2, Imprison[me]nt for a term of 84 months to run consecutive to the term imposed on Count 1; placed on Supervised Release for a term of 5 years to run concurrent with the term imposed on Count 1; $100.00 Special Assessment. Deft. remanded to custody. (Court Reporter Peppy Peterson, OCR.) (sneal,) (Entered: 01/31/2011)
02/02/2011	76	JUDGMENT as to Allen Ryan Alleyne (1), Count(s) 1, Imprisonment for a term of 46 months; placed on Supervised Release for a term of 3 years; $100.00 Special Assessment; $13,201.99 Restitution; Count(s) 2, Imprison[me]nt for a term of 84 months to run consecutive to the term imposed on Count 1; placed on Supervised Release for a term of 5 years to run concurrent with the term imposed on Count 1; $100.00 Special Assessment. Signed by District Judge Robert E. Payne on 2/2/2011. (lcha,) (Entered: 02/02/2011)
02/02/2011	77	Sealed Statement of Reasons as to Allen Ryan Alleyne. Signed by District Judge Robert E. Payne on 2/2/11. (lcha,) (Entered: 02/02/2011)
02/15/2011	78	NOTICE OF APPEAL by Allen Ryan Alleyne as to 76 Judgment,, (Maguire, Mary) (Entered: 02/15/2011)

* * *

03/04/2011 84 TRANSCRIPT as to Allen Ryan Alleyne for dates of 09/01/2010 before Judge Hon. Robert E. Payne, re 78 Notice of Appeal Court Reporter Gil Halasz, Telephone number 804-916-2248. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 4/4/2011. Redacted Transcript Deadline set for 5/4/2011. Release of Transcript Restriction set for 6/2/2011.(halasz, gil) (Entered: 03/04/2011)

03/04/2011 85 TRANSCRIPT as to Allen Ryan Alleyne for dates of 09/02/2010 before Judge Hon. Robert E. Payne, re 78 Notice of Appeal Court Reporter Gil Halasz, Telephone number 804-916-2248. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 4/4/2011. Redacted Transcript Deadline set for 5/4/2011. Release of Transcript Restriction set for 6/2/2011.(halasz, gil) (Entered: 03/04/2011)

* * *

03/15/2011	92	TRANSCRIPT as to Allen Ryan Alleyne for dates of September 3, 2010 before Judge Robert E. Payne, re 78 Notice of Appeal Court Reporter Peppy Peterson, Telephone number 804-916-2267. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 4/14/2011. Redacted Transcript Deadline set for 5/16/2011. Release of Transcript Restriction set for 6/13/2011.(peterson, peppy) (Entered: 03/15/2011)
03/15/2011	93	TRANSCRIPT as to Allen Ryan Alleyne for dates of September 7, 2010 before Judge Robert E. Payne, re 78 Notice of Appeal Court Reporter Peppy Peterson, Telephone number 804-916-2267. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 4/14/2011. Redacted Transcript Deadline set for 5/16/2011. Release of Transcript Restriction set for 6/13/2011.(peterson, peppy) (Entered: 03/15/2011)

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04/10/2011 96 TRANSCRIPT as to Allen Ryan Alleyne for dates of January 28, 2011, before Judge Robert E. Payne, re 78 Notice of Appeal. Court Reporter Peppy Peterson, Telephone number 804-916-2267. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER Redaction Request due 5/10/2011. Redacted Transcript Deadline set for 6/10/2011. Release of Transcript Restriction set for 7/11/2011.(peterson, peppy) (Entered: 04/10/2011)

* * *

12/15/2011 98 Opinion of USCA as to Allen Ryan Alleyne re 78 Notice of Appeal AFFIRMS the district courts judgment.(lbre,) (Entered: 12/15/2011)

12/15/2011 99 JUDGMENT of USCA as to Allen Ryan Alleyne re 78 Notice of Appeal : In accordance with the decision of this court, the judgment of the district court is affirmed. This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.(lbre,) (Entered: 12/15/2011)

01/09/2012 100 USCA Mandate as to Allen Ryan Alleyne re 78 Notice of Appeal : The judgment of this court, entered 12/15/2011, takes effect today. This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.(lbre,) (Entered: 01/09/2012)

04/11/2012 101 Appeal Remark re 78 Notice of Appeal : USCA transmittal of Supreme Court Record Request for petition of writ of certiorari filed 3/14/12 (No. 11-9335). (lbre,) (Entered: 04/12/2012)

04/18/2012 102 Appeal Remark re 78 Notice of Appeal: Letter to U.S. Supreme Court in response to request for record on appeal – We have confirmed that it is not necessary that we electronically, or otherwise, transmit any portion of our courts file at this time. The Supreme Court requestor is able to review the U.S. District Court case on PACER. See letter for details. (lbre,) (Entered: 04/18/2012)

RELEVANT DOCKET ENTRIES

GENERAL DOCKET FOR
United States Court of Appeals for the Fourth Circuit

Court of Appeals Docket #: 11-4208

02/17/2011	1	Criminal case docketed. Originating case number: 3:10-cr-00134-REP-1. Date notice of appeal filed: 02/15/2011. Case manager: RSewell. [11-4208] (RHS)
02/17/2011	2	ORDER filed [998527565] appointing/assigning counsel. Mary Elizabeth Maguire for Allen Ryan Alleyne in 11-4208. Representation Type: FPD.. Copies to all parties. [11-4208] (RHS)

* * *

06/21/2011	22	BRIEF by Appellant Allen Ryan Alleyne in electronic and paper format. Type of Brief: Opening. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 06/22/2011. Is this a redacted brief? No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998616894] [11-4208] Mary Maguire
06/21/2011	23	NOTICE OF PAPER FILING by Appellant Allen Ryan Alleyne. Type of paper document filed: appendix Description: Joint Appendix, 3 vols. (vol. III under seal) Date paper copies

mailed, dispatched or delivered to court: 06/22/2011 Method of filing paper copies: courier [11-4208] Mary Maguire

* * *

06/21/2011 26 APPENDIX (PAPER) file-stamped, on behalf of Allen Ryan Alleyne. Total number of volumes (including any sealed): 3. Total number of pages in all volumes: 1057. Total number of sealed volumes: 1. Entered on Docket Date: 06/30/2011. [998623055] [11-4208] (RHS)

* * *

08/12/2011 32 BRIEF by Appellee US in electronic and paper format. Type of Brief: Response. Method of Filing Paper Copies: hand delivery. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 08/15/2011. Is this a redacted brief?No If yes, have you verified that the redacted material cannot be revealed by cutting and pasting text? N/A [998654097] [11-4208] Michael Gill

* * *

08/25/2011 34 BRIEF by Appellant Allen Ryan Alleyne in electronic and paper format. Type of Brief: Reply. Method of Filing Paper Copies: courier. Date Paper Copies Mailed, Dispatched, or Delivered to Court: 08/25/2011. Is this a redacted brief?No If yes, have you verified that the redacted material

cannot be revealed by cutting and pasting text? N/A [998664036] [11-4208] Mary Maguire

* * *

11/30/2011	36	NOTICE ISSUED RE: Rule 34 pre-argument review. [11-4208] (TO)
12/15/2011	37	UNPUBLISHED AUTHORED OPINION filed. Originating case number: 3:10-cr-00134-REP-1 Copies to all parties and the district court/agency. [998744810].. [11-4208] (RHS)
12/15/2011	38	JUDGMENT ORDER filed. Disposition method: 11-4208 opn.u.sub. Decision: Affirmed. Originating case number: 3:10-cr-00134-REP-1. Entered on Docket Date: 12/15/2011. [998744816] Copies to all parties and the district court/agency.. [11-4208] (RHS)

* * *

01/09/2012	41	Mandate issued. Referencing: [38] Judgment order, [37] Unpublished Authored Opinion. Originating case number: 3:10-cr-00134-REP-1.. [11-4208] (RHS)
03/19/2012	42	SUPREME COURT REMARK – petition for writ of certiorari filed. 03/14/2012. 11-9335. [11-4208] (AW)
10/09/2012	43	SUPREME COURT REMARK – petition for writ of certiorari granted. 10/05/2012 [11-4208] (AW)

IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	CRIMINAL NO. 3:10CR134 (JRS)
v.	
ALLEN RYAN ALLEYNE, Defendant.	18 U.S.C. §§ 1951(a) and 2 Robbery Affecting Commerce (Count 1)
	18 U.S.C. §§ 924(c)(1) and 2 Using, Carrying, and Possessing a Firearm in Relation to a Crime of Violence (Count 2)

INDICTMENT

[Filed May 5, 2010]

MAY 2010 Term – at Richmond, Virginia

THE GRAND JURY CHARGES THAT:

INTRODUCTION

At all times material to this indictment, the Mapco / East Coast store (#4064), located at 6460 Boydton Plank Road, Petersburg, Virginia, was a business engaged in receiving and selling goods in interstate commerce, in an industry that affects interstate commerce.

COUNT ONE
(Robbery Affecting Commerce)

On or about October 1, 2009, in the Eastern District of Virginia, defendant, ALLEN RYAN ALLEYNE, aided and abetted by others known and unknown to the Grand Jury, did knowingly and unlawfully obstruct, delay and affect, and attempt to obstruct, delay and affect commerce as that term is defined in Title 18, United States Code, Section 1951(b)(3), and the movement of articles in commodities in such commerce, by knowingly and willfully committing robbery, as that term is defined in Title 18, United States Code, Section 1951(b)(1), in that the defendant did unlawfully take and obtain property consisting of approximately $13,201.99 in United States currency and checks from the person of, and in the presence of, Mapco / East Coast store manager P.M., against his will by means of actual and threatened force, violence and fear of injury, immediate and future, to ~~their~~ [M.D.] his persons [DSH], that is, one of the robbers used, carried, displayed, possessed, and brandished a firearm at P.M., and demanded money from the deposit bag belonging to the business.

(In violation of Title 18, United States Code, Sections 1951(a) and 2).

COUNT TWO

(Using, Carrying, and Possessing a Firearm in Relation to a Crime of Violence)

On or about October 1, 2009, in the Eastern District of Virginia, defendant, ALLEN RYAN ALLEYNE, aided and abetted by a person unknown to the Grand Jury, did knowingly use, carry, brandish, and possess a firearm during and in relation to and in furtherance of the commission of a crime of violence for which he may be prosecuted in a court of the United States, to wit: Interference with Commerce by Robbery, as charged in Count One above.

(In violation of Title 18, United States Code, Sections 924(c)(1) and 2).

A TRUE BILL

NEIL H. MACBRIDE
UNITED STATES ATTORNEY

By: /s/ Michael Gill
Michael R. Gill
Assistant United States Attorney

IN THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITE[D] STATES OF AMERICA	)	Criminal No. 3:10CR134
	)	September 3, 2010
vs.	)	
	)	
ALLEN R. ALLEYNE	)	

COMPLETE TRANSCRIPT OF THE JURY TRIAL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

Michael R. Gill, Esquire
Kevin Driscoll, Esquire
Office of the U.S. Attorney
600 East Main Street
Suite 1800
Richmond, Virginia 23219

Mary E. Maguire, Esquire
Nia A. Vidal, Esquire
Office of the Federal Public Defender
701 East Broad Street
Suite 3600
Richmond, Virginia 23219

* * *

[Excerpt, transcript pages 832:18 through 845:5]

[832]. . . .

[THE COURT:] I'm going to talk to you in a moment about the elements of the case, the charge. These two charges, each one of them has three elements, but the Government has to prove beyond a reasonable doubt each element, and unless it does that, the defendant – proves that the defendant has committed each – every element of an offense with which he's charged beyond a reasonable doubt, then you have to find him not guilty.

[833] So if you find he's – reasonable doubt exists as to any one of the elements, then that results in an acquittal. The indictment charges the offense was committed on or about a certain date, and proof need not establish with certainty the exact date of the alleged offense. It's sufficient if the evidence in a case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

Remember that a separate crime is alleged against the defendant in each of the two counts of the indictment and each offense that is alleged, and any evidence pertaining to it should be considered separately by you, and the fact that you find the defendant guilty or not guilty of one offense charged in the indictment should not control your verdict as to any other offense charged in the indictment. That's simply a long legal way of saying if you find the defendant guilty of one offense, you can't just decide automatically he's guilty of the other.

The nature – now we're going to talk about the elements. In count one, he's charged that on or about

the first day of October, that the defendant, aided and abetted by others, knowingly and unlawfully obstructed, delayed, and affected – attempted to obstruct, delay, and affect commerce in the movement of articles and commodities in such commerce by knowingly and willfully committing robbery in that the [834] defendant did unlawfully take and obtain property consisting of approximately $13,209.99 – that is not really approximately, is it? In United States currency and checks from the person of and in the presence of the manager of the Mapco East Coast store against his will by means of – that's Mr. McLaughlin, and it's alleged, I believe a[s] p.m. Isn't that what it alleges in here?

MR. GILL: It is, Your Honor.

THE COURT: And that was taken against his will and it was done by means of actual and threatened force, by violence, in fear of injury, immediate and in the future to his person, that one of the robbers used, carried, displayed, possessed, and brandished a firearm at Mr. McLaughlin and demanded money from the deposit bag belonging to the business.

The law says whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce by robbery or attempts, or commits or threatened physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be guilty of an offense.

Now, there are three elements. In order to sustain its burden of proof for the crime of obstructing, delaying, or affecting interstate commerce by robbery as charged in count one, the Government must prove beyond a reasonable doubt three elements: One, that the defendant, Mr. Alleyne, induced or [835] attempted to induce Mapco East Coast store manager, Mr. McLaughlin, to part against his will with property consisting of $13,201.99 in check and currency.

Two, that the defendant, Mr. Alleyne, did so knowingly and deliberately; and three, in so acting, interstate commerce was obstructed. And that he – and that he took that property – the second one, I left out something. The second one is that Mr. Alleyne knowingly and deliberately took that property or tried to take that property by robbery, and I'm going to define robbery for you in just a minute.

The term obstructs, delays, or affects commerce simply means any action which in any manner or degree interferes with, changes, or alters the movement or transportation or the flow of goods, merchandise, money, or other property. It isn't necessary for the Government to prove that the defendant actually intended to obstruct, delay, or affect commerce. The Government must prove beyond a reasonable doubt that the defendant deliberately performed an act, the ordinary and natural consequence of which would be to obstruct, delay, or affect commerce, and that commerce was, in fact, obstructed, delayed, or affected.

Robbery means the unlawful taking or obtaining of personal property from the person or in the

presence of another against his will by means of actual or a threatened force or violence or fear of injury, immediate or future injury, to his [836] person or property or property in his custody or possession or the person or property of a relative or member of his family or anyone in his company at the time of the taking of the property.

The term property as used in these instructions means money or anything of value. It's not limited to tangible physical items and includes the right to conduct business free from wrongful force, coercion, or fear.

Commerce, the term commerce means commerce within the District of Columbia or any territory or possession of the United States and all commerce between any points in the state, territory, possession, or the district, and any point outside thereof. All commerce between points within the same state through anyplace outside such state and all other commerce over which the United States has jurisdiction – the parties, I believe have stipulated that commerce, the definition of commerce is satisfied.

Now, count two. Count two of the indictment charges that on or about the first day of October in the Eastern District of Virginia, Mr. Alleyne, aided and abetted by others, knowingly used, carried, brandished, possessed a firearm during and in relation to and in furtherance of the commission of a crime of violence for which he may be prosecuted in a court of the United States, to wit, interference with commerce by robbery.

[837] In other words, it's alleged that he used this firearm, possessed it, carried it, and/or brandished it in connection with the robbery count, count one.

So the law says whoever, during and in relation to any crime of violence, uses or carries a firearm, or who in furtherance of any such crime possesses a firearm shall be guilty of an offense against the United States.

Now, in order to prove the crime of using, carrying, or brandishing a firearm during and in relation to a crime of violence or possession of a firearm in furtherance of a crime of violence as charged in count two, the Government must prove beyond a reasonable doubt the following elements: One – and they have to be proved beyond a reasonable doubt – the defendant, Mr. Alleyne, committed the crime of interference of robbery – of commerce by robbery as identified in count one.

In other words, the first element of count two is that you find him guilty of count one. Two, during and in relation to the commission of that crime, he knowingly used, carried, or brandished a firearm in furtherance of that crime or that he knowingly and unlawfully possessed a firearm in furtherance of that crime.

Three, the defendant's use, carrying, or brandishing of that firearm or possession was during and in relation to the crime identified in count one of the indictment.

The term crime of violence means an offense that is a [838] felony and has as one of its essential elements the use, attempted use, or threatened use of physical force against the person or property of another or an offense that by its very nature involved a substantial risk that such force may be used.

The offense alleged in count one of the indictment, interference with commerce by robbery is, I instruct you, a crime of violence. It is, of course, up to you whether the defendant committed such a crime and whether that's been proved beyond a reasonable doubt.

The term firearm simply means any weapon, including a starter gun, which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of a weapon, or any firearm muffler or firearm silencer.

Uses or carries a firearm means having a firearm or firearms available to assist or aid in the commission of a crime identified in count one. In determining whether the defendant has used or carried a firearm, you may consider all of the factors received into evidence including the nature of the underlying crime of violence, the proximity of the defendant to the firearm in question, the usefulness of the firearm to the crime that's alleged, and the circumstances surrounding the presence of the firearm.

The Government is not required to show that the defendant actually displayed or fired the weapon. The [839] Government is required to prove beyond a

reasonable doubt that the firearm was in the defendant's possession or under his control at the time a crime of violence was committed.

What does possessed mean? Possession, that's the next term. The term to possess simply means to exercise control or authority over something at a given time. There are several types of possession. There's actual possession, constructive possession, sole possession, and joint possession.

The possession is considered actual possession when a person knowingly has direct physical control or authority over something. The possession is called constructive possession when a person doesn't have direct physical control over something but can knowingly control it and intends to control it sometimes through another person.

The possession can be knowingly exercised by one person, which is called sole possession, or the possession can be exercised jointly when it is shared by two or more people. The term to possess a firearm in furtherance of a crime of violence means that the firearm helped forward, advance, or promote the commission of the crime.

The mere possession of the firearm at the scene of the crime is not sufficient. The Government must present evidence which proves beyond a reasonable doubt that the firearm played some part in the furthering of the crime or the committing of the crime.

[840] In making the determination, you can consider all the evidence as to the ways in which a firearm might be involved in committing a crime of violence, and you may consider but are not limited to the type of firearm, the accessibility of the firearm, the circumstances under which the firearm was found, and the nature of the crime of violence alleged in this case.

Now, the term knowingly is used in these elements, and the term knowingly here as to describe the defendant's state of mind simply means that he was conscious or aware of the facts – aware of his actions, excuse me, realized what he was doing or what was happening around him and did not act because of ignorance, accident, or mistake.

You are also going to be asked to find out whether or not the Government's proved beyond a reasonable doubt that the defendant brandished a firearm. In order to find that the defendant brandished a firearm, you must do so unanimously, and brandish means to display all or part of the firearm or otherwise make the presence of the firearm known to another person in order to intimidate that person regardless of whether the firearm is directly visible.

Now, the defendant is charged in this case with aiding and abetting somebody else in the commission of the crime as well as committing the crime himself. What does aiding and abetting mean? He's charged with aiding and abetting in both counts one and two.

[841] So I tell you now that a person can violate the law even though he or she does not personally do each and every act constituting the offense if that person aided and abetted the commission of the offense, because the law says whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission is punishable as a principal. That is, if you aid and abet, you are just as guilty as a principal. That's what that part of the law means.

Before a defendant can be held responsible for aiding and abetting in the commission of a crime, it is necessary that the Government prove beyond a reasonable doubt that the defendant knowingly and deliberately associated himself in some way with the crime charged and participated in it with intent to commit the crime.

In order to be found guilty of aiding and abetting the commission of the crimes charged in counts one and two of the indictment, the Government must prove beyond a reasonable doubt that the defendant, one, knew that the crime charged was to be committed or was being committed; two, knowingly did some act for the purpose of aiding, commanding, or encouraging the commission of that crime; and three, acted with the intention of causing the crime to be committed.

And by the way, before a defendant may be found guilty as an aider and abettor to a crime, the Government must also prove beyond a reasonable doubt

that someone committed [842] each of the elements of the offense charged as detailed for you in these instructions. That is to say under the facts of this case, the Government has to prove beyond a reasonable doubt that someone, i.e., the alleged – the person who is alleged to have been with him and to have held the gun did what it takes to prove beyond a reasonable doubt the elements of count one and count two. And then you have to find that he knew that crime was being charged, that is as to count one or count two, that he knowingly did some act for the purpose of aiding, abetting, commanding, or encouraging the crime, and that he acted with the intention of that crime, either count one or count two when you are considering it, that was charged to be committed.

Now, remember, merely being present at the scene of a crime or merely knowing that a crime is being committed or is about to be committed isn't enough for the jury to find that the defendant aided and abetted the commission of a crime. The Government must prove the defendant knowingly associated himself with the crime in some way as a participant, someone who wanted the crime to be committed, not merely a spectator.

Now, we're at the last instruction. When you retire to your jury room to deliberate, you're going to elect one of your members as the foreperson of the – and that person will preside over the deliberations and will be your spokesperson here in court.

[843] Your verdict has to represent the collective judgment of the jury in order to return a verdict. Therefore, it is necessary that each juror agree to it. In other words, your verdict has to be unanimous. It is – as to each count.

It is your duty as jurors to consult with one another and to deliberate with one another with a view towards reaching agreement if you can do that without violence to individual judgment. So each of you have to decide this case for himself or herself. But do that only after an impartial consideration of the evidence in the case with your fellow jurors. And in the course of your deliberations, don't you hesitate to reexamine your own views and to change your opinion if you consider it erroneous, but don't you surrender your honest conviction solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times you are not partisans. You are the judges. You are the judges of the facts of this case, and your sole interest is to seek the truth from the facts that have been proved during the trial, and your verdict, remember, must be based only on the evidence received. Nothing you've seen or heard outside the Court can be considered.

Nothing I said during the course of the trial is intended to suggest to you what I think your verdict ought to be. Nothing in these instructions is intended to suggest that to you either, because that is your exclusive responsibility.

[844] The punishment provided by law for the offenses charged in the indictment is a matter exclusively within the province of the Court and should never be considered by you in any way in arriving at an impartial verdict as to the offenses charged in the indictment.

I don't remember whether any of you sat on state juries, but in state court, the jury will decide both the guilt or innocence and then assess a punishment. In the federal court, juries only decide the guilt or innocence, and the Court decides the punishment if there's a finding of guilt.

A formal verdict has been prepared for your convenience and use, and it's not intended to suggest a result either. Now, we, the jury – and you go through these one at a time. We, the jury, find the defendant by his name, and you write in here what you find, guilty or not guilty as charged in count one. Then go to count two, guilty or not guilty as to count two.

Now, if you find the defendant guilty of count two, then you need to find some other things, and you have to answer the following in relation to count two: We, the jury, unanimously find that the defendant used or carried a firearm during and in relation to a crime of violence. If you unanimously agree with that, check it.

Possessed a firearm in furtherance of a crime of violence, brandished a firearm in connection with a crime of [845] violence. You just check which one, if

any, that you find, but you have to all be in agreement on any one that you do check yes we find. In other words, it has to be unanimous there, too. And the foreperson signs and dates the verdict and brings it back here to the courtroom, and we publish it.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITE[D] STATES OF AMERICA	Criminal No. 3:10CR134
vs.	September 7, 2010
ALLEN R. ALLEYNE	

COMPLETE TRANSCRIPT OF THE JURY TRIAL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE, AND A JURY

APPEARANCES:

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* * *

[Excerpt, transcript pages 864:19 through 873:11]

[864]. . . .

THE COURT: We have two questions. What are the numbers, Mr. Neal, four and five?

THE CLERK: Four and five, Your Honor.

THE COURT: The first one to be –

THE CLERK: I'm sorry, five and six. You marked these three and four.

THE COURT: But I thought we said the other ones were [865] consolidated.

THE CLERK: I thought they were, too, but I think we had another question about snacks or something.

THE COURT: Two of them on little pages.

THE CLERK: I'll look for them.

THE COURT: Anyway, I'll call them five and six. Check and see, and if they're not – if we don't have one of those, let's just call it deliberately omitted. Number five is – Court Exhibit 5 is, on count two of the indictment, does all three elements need to be proved or will two prove guilt or no guilt. The answer to that one is pretty obvious.

Court Exhibit 6 is, to be guilty of brandishing a firearm in the second count, third stipulation, must the defendant himself hold the firearm to the victim. The answer to that is no under aiding and abetting; right?

MS. MAGUIRE: I think that's correct, Your Honor.

MR. GILL: Correct, Your Honor.

THE COURT: So I need to give them proper instructions on those points, and I will do that by pointing them to – what was it – number 38 which is count two and say, there are three elements, and he has to be found guilty of all three elements, and then brandishing in the second count, I'll say in the – he's charged in the second count with being both a principal and an aider and abettor, and if he is found to be an aider and abettor, then he can be found guilty if all the [866] elements are proved.

If all the elements are not proved, then I'm going to read the aiding and abetting instruction to them again. I think that will take care of what you all need, or do you think I need to do something else?

MR. GILL: That's fine with the United States, Your Honor.

MS. MAGUIRE: That's acceptable to the defendant, Your Honor.

THE COURT: Listen tight in case I don't do it right. You know who said listen tight, don't you? Anybody? John Wayne.

(Jury in.)

THE CLERK: That is five and six. Now I remember. One was the distance of the thing, then

two was the two little stickies, so then there's three, four, five, six. We're right.

(Jury in.)

THE COURT: All right, everybody here? Okay. On the first question, you say on count two of the indictment, do all three elements need to be proved or will two prove guilt or no guilt.

The rule is, as is in instruction number 25, that all [867] of the elements must be proved beyond a reasonable doubt, and if there is no proof beyond a reasonable doubt as to one of, say, three elements, then if you are not convinced beyond a reasonable doubt, then your verdict as to that count is not guilty because you have to prove all three elements or four or whatever they are.

In count two there are three elements, okay. And those elements are outlined in instruction number 38, and it says that they have to prove the following three elements beyond a reasonable doubt: One element, first element, that the defendant, Allen Ryan Alleyne, committed the crime of interference of commerce by robbery as identified in count one.

Two, during and in relation to the commission of that crime, he knowingly used, carried, or brandished a firearm in furtherance of that crime, or he knowingly and unlawfully possessed a firearm in furtherance of that crime. Three, that his use, carrying, or brandishing of that firearm or possession of that firearm was

during and in relation to the crime identified in count one, that is the robbery, all right.

Now, in – your next question was, to be guilty of brandishing a firearm in the second count, third stipulation – I think you mean third paragraph of the element. Is that what you are talking about? Third element, must the defendant himself hold the firearm on the victim. The answer is in instruction 45-A, and in that instruction and in count number [868] two, the defendant is charged with aiding and abetting someone else in the commission of the crime as well as committing the crime himself, and if either one of those things is proved beyond a reasonable doubt, then he's guilty. He's been proved guilty beyond a reasonable doubt.

And I want to review the aiding and abetting with you. He's charged with aiding and abetting both the crime alleged in count one and in count two, and the law says that a person can violate the law even though the person doesn't personally do each and every act that makes up the offense if that person is what's called an aider and abettor or if he aided and abetted the crime.

So the law says whoever commits an offense against the United States or aids and abets, counsels, commands, induces, or procures its commission is punishable as a principal. That's just the legal way of saying if you do those things, you're punishable as much as if you did them all yourself. But the Government has to prove that beyond a reasonable doubt.

It has to prove that he aided, abetted, counseled, commanded, induced, or procured the commission of the crime that's charged in count two as related to your question.

Now, let's remember this, that before a defendant can be held responsible for aiding and abetting others in the commission of the crime, it is necessary that the Government [869] must prove beyond a reasonable doubt that the defendant knowingly and deliberately associated himself in some way with the crime charged, that is the brandishing of the firearm you asked about, and participated in it with the intent to commit the crime.

So – and also, in order to be found guilty of aiding and abetting at all, then the Government must prove beyond a reasonable doubt the following things: One, that he knew that the crime charged was to be committed or was being committed, and in your case then, your question would be that he knew that the crime charged in count two was going to be committed or was being committed. Secondly, that he knowingly did some act for the purpose of aiding, commanding, or encouraging the commission of the crime charged in count two, the one you are asking about, and three, he acted with the intention of causing the crime to be – of the crime charged in count two, which is what your question is, to be committed.

Keep in mind this: Remember that if you are found guilty of aiding and abetting the crime, then it's

the same thing as if you did it by yourself, but there's one part of that we haven't gone over yet that we have to keep in mind when we're deciding this issue.

Before this defendant or any defendant can be found guilty as an aider and abettor to a crime, the Government has to prove beyond a reasonable doubt that someone committed each [870] of the essential elements of the offense charged as detailed for you in the instructions. And merely being present at the scene of the crime or merely knowing that a crime is being committed or is about to be committed is not enough for you to find that he aided and abetted the commission of the crime because the Government must prove that the defendant knowingly associated himself with the crime in some way as a participant, someone who wanted the crime to be committed, not just a mere spectator.

Now, in this case, there is testimony, and the aiding and abetting testimony comes into play because of this testimony, that someone got – a fellow, taller than the defendant, I believe it was, got out of the car that was parked on that ramp there, walked back to the car and put the gun up here next to the fellow's, Mr. McLaughlin's neck and said, give me the money.

In order to find this defendant guilty of aiding and abetting the brandishing of the firearm and the doing of holding it up to his neck, you have to be satisfied beyond a reasonable doubt that, and the Government has to have proved back to instruction

number 38, all three of these elements that somebody did this. In other words, in your case, it would be that – I don't know what the other fellow's name is. I don't think that any of us do – that the other fellow actually did all three of these things, and if you find the other fellow did [871] not do all three of these things, then you don't even go to aiding and abetting.

He can't be found guilty, but if you find that the other fellow, the driver, I guess, the guy that got out of the car and held the gun up here, did these three things, then you have to go back, and you have to ask yourself, has the Government also proved beyond a reasonable doubt that Mr. Alleyne knew that that crime was about to be committed or being committed, that he did some act knowingly to aid, command, or encourage the commission of that crime, i.e., the brandishing of the firearm as you asked your question about in count two, and three, that he acted with the intention of causing the crime charged to be committed.

So you have to first be satisfied that somebody actually committed the crime charged, and that's those three elements up there. So if you find no on that, then you don't go any further. If you find yes, then you have to find the three things I just outlined about Mr. Alleyne. Does that answer your question? Any other question? Okay? Do you have any corrections to the instructions or anything that I said that wasn't right?

MS. MAGUIRE: Not on behalf of the defense.

MR. GILL: Just clarification, Your Honor. It occurred to me during the Court's explanation that it could be that the jury is referring to the verdict form, and with [872] respect to that, we outlined the three different areas if the jury finds him guilty, to make sure they are unanimous on one of those areas.

THE COURT: Well, there is on the verdict form as an additional thing, there's on the verdict form, did he commit – do you find him guilty or not guilty of count two. Then in addition to that, it says, do you find him guilty of using or possessing – then the next line is carrying and the next line is brandishing.

Just remember that you can check yes to all three of those or none of those. That's your prerogative, but if you check yes to any one of those, if you check it, you all have to agree to that, so that three of you can't agree to the use and carrying, three of you to possession and the other six the brandishing. Do you see what I mean? You have to be unanimous whichever one you do agree to if you do agree to any one of them. Is that a correct statement?

MS. MAGUIRE: Yes, Your Honor.

MR. GILL: Yes, Your Honor.

THE COURT: Any questions on that? No, yes?

JUROR: We don't have to have all three checked.

THE COURT: No, you don't have to check any of them, and – yeah, you have to check one of them. In order to convict him, it has to be at least one, but it doesn't have to be all three. But you have to be unanimous in the one that you [873] agree to, yes. I'm glad you asked that clarifying question. All right, is that it? You may return to deliberate your verdict.

(Jury out.)

THE COURT: I'm glad you thought about the verdict form because I think that maybe that may actually have been part of what they were asking. All right, we'll be in recess.

(Recess taken.)

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA	Verdict
	[Filed Sept. 7, 2010]
v.	Criminal No.
ALLEN RYAN ALLEYNE	3:10CR00134-01

We, the jury, find the Defendant, ALLEN RYAN ALLEYNE,

Guilty as charged in Count One of the Indictment.
(Guilty or Not Guilty)

Guilty as charged in Count Two of the Indictment.
(Guilty or Not Guilty)

If the jury finds the defendant Guilty as to Count Two, please answer the following:

In relation to Count 2, we the jury unanimously find that the defendant:

✓ Used or carried a firearm during and in relation to a crime of violence.

___ Possessed a firearm in furtherance of a crime of violence.

___ Brandished a firearm in connection with the crime of violence.

9-7-2010	[Redacted]
Date	Foreperson's Signature

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

UNITE[D] STATES OF AMERICA	Criminal No. 3:10CR134
vs.	January 28, 2011
ALLEN R. ALLEYNE	

COMPLETE TRANSCRIPT
OF THE SENTENCING HEARING
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE . . . .

APPEARANCES:

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[Excerpt, transcript pages 2:1 through 21:24]

[2] PROCEEDINGS

THE CLERK: Criminal number 3:10CR00134-01, United States of America versus Allen Ryan Alleyne. Mr. Michael Gill represents the United States. Ms. Mary E. Maguire and Ms. Nia A. Vidal represent the defendant. Are counsel ready to proceed?

MR. GILL: United States is ready, Your Honor.

MS. MAGUIRE: Ready on behalf of Mr. Alleyne, Your Honor.

MR. GILL: Good morning, Your Honor.

THE COURT: Morning.

MR. GILL: The defendant is before the Court after having previously gone to trial in September of last year. He was convicted by a jury on two separate counts, that being a robbery in violation of 18 U.S.C. Section 1951 as well as using and carrying a firearm during and in relation to a crime of violence in violation of 18 U.S.C. Section 924(c).

As he stands here today before the Court, Your Honor, on count one, the guideline range is 46 to 57 months. Count two for brandishing is a consecutive sentence of 84 months. There is one objection lodged by the defense to the brandishing enhancement which is currently at issue before the Court. Thank you.

THE COURT: You don't have any objections to the [3] presentence report?

MR. GILL: We do not, Your Honor.

THE COURT: You withdrew yours.

MR. GILL: That is correct, Your Honor.

THE COURT: All right. You object to the decision to have the mandatory minimum for count two be five years – be seven years instead of five years which is what the probation officer did, I guess, in the addendum, wasn't it?

MS. MAGUIRE: That's correct. The original report had it as five, and in the addendum it came back at seven.

THE COURT: Pursuant to an objection made in the resolution process by the United States Attorney's Office; right?

MS. MAGUIRE: Correct.

THE COURT: Do you have any evidence on the objection?

MS. MAGUIRE: No evidence, Your Honor, just argument.

THE COURT: All right. I will hear you.

MS. MAGUIRE: Your Honor, it is our position that the jury verdict on count two, which is the 924(c) conviction, should carry the day in this case, and the Court should impose the five-year mandatory minimum. There's basically two reasons – and I'll just say up front that I acknowledge that

Harris clearly says that brandishing is a sentencing factor.

I understand that that is the Supreme Court's [4] position; however, I would notice that the Supreme Court is now five/four on this whole issue under 924(c)s about whether anything that raises the floor or raises the ceiling –

THE COURT: What do you want me to do; make it five/five?

MS. MAGUIRE: Your Honor, well, I think that just gives –

THE COURT: It's five/four against you, though, isn't it?

MS. MAGUIRE: That is correct, Your Honor.

THE COURT: I have to apply what they do. I'd be very flattered by going on the Supreme Court or even being considered for it, but I checked, and I didn't see anybody gave me appointment up there.

MS. MAGUIRE: Yes, Your Honor, but I think basically upon – first of all, I think this case can be distinguished from *Harris*, and second of all, I think given the language of the Supreme Court in *Dean*, there is an intellectually honest way for the Court to impose a five-year mandatory minimum.

First of all, I would note in *Harris*, the Government in *Harris* did not allege brandishing in the indictment. The defendant went to trial, he was

convicted, and at the sentencing phase, the Court imposed the seven years for the brandishing, finding it to be a sentencing factor, and that was affirmed by the Supreme Court.

[5] However, in this case, the Government did choose to allege brandishing in the indictment in this case, and a special verdict form was prepared for the jury asking them to make a specific finding. The jury's finding was simply possession in furtherance of a crime of violence. They rejected any evidence of brandishing, and I think that that is consistent –

THE COURT: I think it's fair to say they didn't find brandishing beyond a reasonable doubt because they were told they had to find it beyond a reasonable doubt if they were going to do it; wasn't that right?

MS. MAGUIRE: That's correct. And given that, they found simply the possession in relation to a crime of violence. And I think that that is consistent with the evidence in the case, because the theory under which Mr. Alleyne was convicted was an aiding-and-abetting theory.

I think the Government agrees that the person described in the robbery who handled and brandished the gun was not Mr. Alleyne, and I believe the Government would agree that the evidence at trial, if believed, and obviously believed by the jury in this case, was simply that he was in the car throughout the totality of the robbery. So then the question becomes, is there any evidence –

THE COURT: Was he driving?

MS. MAGUIRE: Your Honor –

[6] THE COURT: He drove during the robbery –

MS. MAGUIRE: At the end. The evidence is that the car was pulled over, that someone got out of the driver's side who was the gunman, and then while gunman is robbing the person, the person in the passenger seat slides over to the driver's seat and drives away.

THE COURT: After the –

MS. MAGUIRE: After the robbery is completed.

THE COURT: The gunman got back in the car.

MS. MAGUIRE: Correct. And so – but there is no evidence in the trial record as to whether or not Mr. Alleyne had any knowledge that a gun was going to be used in the robbery or if the gun would be – or a gun would be brandished in the robbery, and I think if the Court is to look –

THE COURT: Is that the issue, whether he had knowledge or reasonable basis to believe that a gun was going to be used?

MS. MAGUIRE: I think under *Dean*, the answer to that question is yes, because in *Dean v. United States*, which is a recent Supreme Court

decision concerning whether the ten-year mandatory minimum under 924(c) requires an intent element, in that case, the Supreme Court found that a ten-year mandatory minimum did not require an intent element, but specifically what the Supreme Court said in *Dean* at page 1853 of that decision, it says, the Supreme Court found that section two of [7] 924(c) provides a seven-year mandatory minimum sentence if the firearm is brandished. Congress expressly included an intent element for that provision by defining brandished to mean, to display all or part of a firearm or otherwise make the presence of the firearm known to another person in order to intimidate that person. The defendant must have intended to brandish the firearm because the brandishing must have been done for the specific purpose.

And in this case, Your Honor, I believe that the jury verdict is supported by conclusion by the jury that there was not evidence beyond a reasonable doubt that Mr. Alleyne knew that a firearm would be brandished during the robbery –

THE COURT: But if it's a sentencing factor, if brandishing is a sentencing factor, then I don't look at that. It's acquitted conduct, basically is what it boils down to, isn't it? Isn't that acquitted conduct?

MS. MAGUIRE: Yeah, under *Watt*.

THE COURT: So I can consider – I've always had trouble with the notion of considering acquitted conduct when the issue has been submitted

to a jury as opposed to when it's been dropped somewhere along the way, because when the jury decides something, you know, they look. They look at the facts. And I don't like the role of being the reverser of juries, but the law says that I look at the sentencing factor under a preponderance of the evidence, and a preponderance is [8] less than beyond a reasonable doubt.

So it is now my task to determine whether the intent element has been proven by a preponderance of the evidence. Is that where we are here in this case?

MS. MAGUIRE: I think so, Your Honor.

THE COURT: Why can't I find that here knowing – the guy got out of the car, the gun was in his hand. The defendant saw the gun, it's reasonable to believe, when the guy got out of the car, and you don't take a gun to a robbery without intending to intimidate somebody. So he aided and abetted that man in the intent to intimidate by a preponderance of the evidence is the Government's theory. What's wrong with that?

MS. MAGUIRE: I think what's wrong with that – first of all, I'm not sure that the trial testimony supports the gun being drawn before the person was out of the car, and so then I think –

THE COURT: What do you think that testimony shows? Refresh my recollection on what you think that evidence was.

MS. MAGUIRE: I think the evidence was that when Pat McLaughlin pulled up to the car, there was a car stopped in front of him that he thought was having road problems, and I think the testimony is that the hood was up, the person came out of the car, and I think that Pat McLaughlin doesn't testify about the gun until the person comes up to his window with the gun.

[9] THE COURT: All right.

MS. MAGUIRE: And so –

THE COURT: So McLaughlin doesn't say he saw the gun as the guy was in route to his car.

MS. MAGUIRE: Right.

THE COURT: But he didn't say anything about the guy drawing the gun. He said he just lifted the gun and pulled it, faced to him; right?

MS. MAGUIRE: Correct.

THE COURT: Can I not infer from that that the gun was drawn when he left the car since he didn't see him draw it and Mr. McLaughlin had a good view of things from the time the guy left the car?

MS. MAGUIRE: I think so.

THE COURT: So the gun was out when he left the car I can infer. Now the question is, how do I attribute that to the defendant, I suppose; is that right?

MS. MAGUIRE: That's correct.

THE COURT: What do you think the evidence is on that? There is none; is that your point?

MS. MAGUIRE: There is none. In fact, Valencia Jones' testimony was she had no knowledge that a gun was going to be used, and, in fact, the only conversation Valencia Jones testified to concerning a gun was at least a month or so later in a hotel room where there's some exchange about you really [10] went hard on that guy or something, I think, is the gist of that exchange. But there is nothing in this record that Mr. Alleyne ever knew or intended that a gun be used in the robbery.

And I think this goes to what the Supreme Court has been struggling with in these decisions, because when you start getting judges, at a sentencing proceeding, overruling a jury verdict on an issue and imposing a punishment greater than that authorized by the jury, it's a violation of due process according to the dissenters on the court.

That's where the problem is with this, because an increased mandatory minimum heightens the loss of liberty and represents the increased stigma that society attaches to the offense, and, consequently, facts that triggered increased mandatory minimum sentence warrant constitutional safeguards, and I think finally, Your Honor, in looking at all the evidence in this case, I would note that the Government, even in their pleadings on page seven, indicates that the Court with this verdict from a jury is free to

impose a sentence within the range of five years to life.

They go on to argue why they think seven is appropriate, but they acknowledge that the verdict supports a range of five years to life. So I think given that –

THE COURT: Seven is within that range.

MS. MAGUIRE: Seven is within the range, but the [11] question is what is the bottom of the range, and I would just note I think the Government conceded in their papers on page seven that the appropriate range is five to life.

That's simply what we are asking the Court to do, is adopt the range of five to life, and then obviously we're going to argue to the Court why we think five is appropriate.

I think with the addendum the way it is, the way the probation officer has given it to you, they are trying to say that the floor is seven and you can't go below that. Our position is, you absolutely can and that the appropriate range is five to life, and based upon the arguments we have presented –

THE COURT: Instead of seven to life.

MS. MAGUIRE: Correct.

THE COURT: But as long as the law is that the Court can consider acquitted conduct – you are calling this acquitted conduct, the brandishing, because it was put to the jury, it was argued to the

jury, and the jury didn't check it off as having been proven beyond a reasonable doubt; right?

MS. MAGUIRE: Correct.

THE COURT: As long as the law is that the Court can consider acquitted conduct, I still have to find that there's a preponderance of the evidence to believe that he knew or reasonably should have known that his buddy, his accomplice would use the gun to intimidate. Is that what you are saying?

[12] MS. MAGUIRE: Correct.

THE COURT: And you are saying there just is a void in the evidence. Did we ever find out how this gun got bought or who bought it or anything?

MS. MAGUIRE: There's no evidence of the gun. The gun was never recovered. Gunman has never been found. We have no evidence on that.

THE COURT: Did the defendant identify the gunman, or did Ms. Jones, or has anybody –

MS. MAGUIRE: No, and, in fact, Ms. Jones' testimony is she had no knowledge that a gun was to be used in the robbery.

THE COURT: I mean the guy, the accomplice, though. Has anybody identified the accomplice. I referred to him as the gunman because he had the gun.

MS. MAGUIRE: No, not to my knowledge.

THE COURT: What evidence, Mr. Gill, is there from which I could find by a preponderance of the evidence that the defendant knew that this gun was going to be used to intimidate the victim?

MR. GILL: Your Honor, when you look at the evidence presented at trial, and under the circumstances of this robbery, I think it clearly shows, well beyond a preponderance of the evidence, that anyone who would be in the defendant's position in that car would have known that a gun was going to [13] be used.

THE COURT: What evidence is there that shows that? I can't remember anything about who knew what about what was in that car. If it's there, I'd like to know about it, but I may be wrong.

MR. GILL: As far as Valencia Jones, she clearly testified and has maintained that she did not know a gun was going to be used in the robbery, that is correct.

THE COURT: How about him? We have this fact. It is undisputed as best I can recall that Mr. McLaughlin – is that his name?

MR. GILL: That is his name.

THE COURT: Turned and looked, and the guy had the gun up like this. There's nothing that McLaughlin said, i.e., the gun was in the side of his neck or the side of his face, there's nothing that I remember that McLaughlin said about seeing the gun as the man walked from the car.

MR. GILL: That is correct, Your Honor.

THE COURT: How do I attribute the knowledge to the defendant that there was a gun? Let's start with that. What evidentiary predicate do I have for that?

MR. GILL: Number one, we do have the jury verdict, Your Honor, and they did find the defendant guilty under aiding and abetting, under using and carrying a firearm. Then the question becomes brandishing. When you look at all the [14] evidence, Your Honor, as far as what is reasonable, we don't know what exactly was said between Allen Alleyne and the second robber, who, by the way, is in state custody on another charge, and we are investigating, and we are going to tie him to this crime eventually. We believe we firmly know who the gunman is.

That individual, per Valencia Jones' testimony, had a close association with Allen Alleyne. In fact, leading up to the robbery, when she passed details on to Allen Alleyne, that other individual was there, and Allen Alleyne, per the phone records and this other individual, I submit to the Court, did extensive surveillance of the East Coast store on September 22nd, 25th, 29th, and 30th for hours where they are watching.

THE COURT: I don't think there's any question about that. That's proven.

MR. GILL: What it established, Your Honor, is a close relationship between the defendant and this gunman and the preparation that went in to doing such a heist as they pulled on October 1st, and they had it so well planned that they actually set up a road block. They knew exactly where Pat McLaughlin was going to drive.

THE COURT: What was the offense of conviction?

MR. GILL: The offense of conviction –

THE COURT: Involving the gun, using and carrying a firearm during and in relation to a crime of violence, and they – he was convicted on the aiding and abetting instruction. [15] Aiding and abetting requires that someone commit a crime and that the defendant knowingly associate himself with the crime and the commission thereof with the desire to see it carried out. Isn't that the standard instruction under aiding and abetting?

MR. GILL: I believe it is, Your Honor.

THE COURT: But the jury didn't find the brandishing, and brandishing, what is the instruction on brandishing?

MR. GILL: Basically, Your Honor, to refer to or otherwise show a weapon in order to intimidate. That, in essence, is what the brandishing sentencing factor is.

THE COURT: Well, if you use a firearm in connection with a crime of violence, what inference is there other than you use it to intimidate?

MR. GILL: I believe that's right, Your Honor –

THE COURT: And if he's been convicted of aiding and abetting and using it, why isn't that sufficient for me to infer that he aided and abetted and the brandishing of it, because there's no question that it was brandished by the man.

MR. GILL: Right, Your Honor.

THE COURT: In other words, why doesn't proof that supports the verdict also support, by a preponderance of the evidence, the finding of aiding and abetting and brandishing?

MR. GILL: I agree, Your Honor. I had not thought about it that way, but that makes sense. The principal [16] brandished the firearm, no question, in the crime. The jury convicted him under aiding and abetting liability which makes you punishable as the principal of the offense which here would be brandishing just as an individual who sits in a car during a bank robbery as the getaway driver, if the gunman goes into the bank and discharges the weapon, the person who sits in the car is responsible for that discharge.

But I also point out to the Court just on an evidentiary standard, and I'll wrap this up real quick,

but the evidence shows a close relationship between these men, and on the day of the robbery, they set up the roadblock, Your Honor.

I submit to the Court, nobody in the defendant's position could have possibly thought for a second that his accomplice was not going to take that gun and pull it out on the victim.

When Pat McLaughlin pulled up on the side of the road – and I'll tell you, Judge, I believe firmly his accomplice had the gun hidden. He had it hidden. There's no doubt about it. He walks up there to Pat McLaughlin – the evidence is clear – and he asked him to roll down his window. He's acting like his car is injured.

When Pat McLaughlin rolls down that window, if the gunman had just said, all right, I know you've got a bag of money, I want it, Pat McLaughlin would have driven off in a second. Instead what happened when Pat McLaughlin rolled down [17] that window, he got a gun right in his neck. The defendant was located in the car just roughly 20 to 30 feet from there.

I believe there's no reasonable view that – of the evidence that completely supports that he was fully aware of what his partner was going to do. He knew it, that's how they planned it, and then he served as the getaway driver after his buddy with the money got in the passenger side. They're coordinated up to that point.

The defendant was in the passenger side when the gunman got out. He slid over, took the driver's wheel when his partner came up with the money and got in on the passenger side. They had everything planned out. Furthermore, there's testimony from Valencia Jones that when he returns the rental car after this robbery, she gets a call from the defendant telling her to get the bullets in the back seat.

He knew exactly that a gun was used, it would be brandished, and there's no doubt – under *Dean*, it's not even an issue. That gun was used to intimidate Pat McLaughlin. I believe the United States court precedent is clear. You have authority, Your Honor. The range is five to life. I don't hide from that, but if this Court finds the facts by a preponderance satisfied a brandishing, he buys seven years under the statute. We request the Court to –

THE COURT: I could avoid the whole problem by finding five to life and sentencing him to seven, couldn't I?

[18] MR. GILL: You could, Your Honor, absolutely.

THE COURT: That's not intellectually honest, though, is it?

MR. GILL: Well, it's your discretion.

THE COURT: My discretion to be dishonest intellectually? I don't think I have that discretion.

MR. GILL: No, Your Honor. I believe, though, if you sentence him to seven – you do have the range of five to life. I believe seven years is warranted under the statute if the Court believes that the facts warrant brandishing. Thank you.

THE COURT: All right. Why isn't the proof beyond a reasonable doubt that the jury did find, the offense of a firearm offense of conviction sufficient?

MS. MAGUIRE: Because a gun can be used in distinct and different ways.

THE COURT: How many ways?

MS. MAGUIRE: Well, the statute –

THE COURT: Other than shooting or scaring?

MS. MAGUIRE: The statute recognizes three. Well, actually four: Use and carry, brandish, which is a distinct difference, and discharging. Those are the three ways that that statute criminalizes a use of a gun, and in response to the question, first of all, Mr. Gill is speculating that there is evidence that people were together, but we have absolutely no evidence of any conversation. We have absolutely no [19] evidence of any plan of how the robbery was going to be executed. That is not before the Court.

But, Your Honor, I think it's just as likely that the person may have had a gun –

THE COURT: You don't think I can infer a plan from the fact they set up a roadblock together in

the same car and one of them got out and the other one slid over? I can't infer a plan from that?

MS. MAGUIRE: You can infer a plan, but aiding and abetting doesn't say that Mr. Alleyne has to know every single detail. There is clearly a plan to do a robbery, but a robbery can be executed in a number of ways.

It's just as likely that the gunman could have walked over to the car and pulled Pat McLaughlin out of the car and had a gun in his waistband if that's one way you want to do it. There's no indication – and this is why I think the language in *Dean* is so important for this Court to understand, is that brandishing is distinct and different from use and carry, and it requires a specific intent.

And the record is devoid here that Mr. Alleyne, even on an aiding-and-abetting theory, intended for the gun to be brandished, and I believe that a gun could have been carried or used which is what –

THE COURT: It doesn't have to be intended to be brandished. It has to be brandished with the intent to [20] intimidate.

MS. MAGUIRE: In order to intimidate, yes.

THE COURT: Specific intent is the purpose of intimidation, not the act of brandishing.

MS. MAGUIRE: The method in which it is to be used and the result intended by that use.

THE COURT: Well, it is clear that discharging and brandishing under the same statute are sentencing factors to be found by the judge, not offense elements to be found by the jury.

In the *Frampton* case in the Second Circuit, the Second Circuit held that a district court didn't violate the Sixth Amendment when, notwithstanding the jury's finding that the defendant had not discharged his weapon during the commission of a drug-trafficking crime, the Court used discharging conduct or the conduct of discharging to sentence the defendant to the ten-year mandatory minimum.

I believe that the decision in *Harris* combined with the evidence in this case calls for the overruling of the objection. It is – brandishing is a sentencing factor. It is to be determined by the preponderance of the evidence. The preponderance of the evidence here would support a finding that the defendant aided and abetted the brandishing that actually, undeniably, and undisputedly occurred.

The defendant's due process rights are not offended [21] by the finding of brandishing notwithstanding the jury's finding to the contrary under a reasonable doubt standard. *Dean* is misplaced, the reliance on *Dean* is misplaced. *Harris* makes clear that the Court can consider the issue of brandishing separate and distinct from the jury's consideration of that issue.

Although the jury did not find beyond a reasonable doubt that the defendant reasonably foresaw his

coconspirator brandishing a firearm for the express purpose of intimidation, the Court is not precluded from finding by the lower preponderance of the evidence that he did, and I so find.

The objection is overruled. Would you stand up, please, Mr. Alleyne. Have you had read the presentence report?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you been over it with your lawyers?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And other than the objection that I just ruled on, are there any other objections?

THE DEFENDANT: No other objections.

THE COURT: All right, you may be seated. The presentence report will be accepted, adopted, and filed as tendered. It will be placed in the record. It will be under seal. It will be available in the event of any appeal except for the confidential sentencing part of it.

* * *

[Excerpt, transcript page 38:19-25]

[38]. . . .

[THE COURT:] Pursuant to 18 U.S.C. Section 3553(a) and to accomplish all the objectives of sentencing, it is the judgment of the Court that the

defendant, Allen Ryan Alleyne, is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 130 months consisting of 46 months on count one and 84 months on count two to run consecutively.

* * *

UNITED STATES DISTRICT COURT
Eastern District of Virginia
Richmond Division

UNITED STATES OF AMERICA	Case Number: 3:10CR00134-01
V.	USM Number: 75605-083
ALLEN RYAN ALLEYNE a/k/a Allan Ryan Alleyne, et al. Defendant.	Defendant's Attorney: Mary E. Maguire, Esquire

JUDGMENT IN A CRIMINAL CASE

[Filed Feb. 2, 2011]

The defendant was found guilty on a Two Count Indictment.

The defendant is adjudicated guilty of these offenses.

Title and Section	Nature of Offense	Offense Class	Offense Ended	Count
18 U.S.C. Secs. 1951(a) & 2	Robbery Affecting Commerce	Felony	10/1/2009	One
18 U.S.C. Secs. 924(c) & 2	Use or Carry a Firearm During and in Relation to a Crime of Violence	Felony	10/1/2009	Two

The defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

01/28/2011
Date of Imposition of Judgment

/s/ REP
Robert E. Payne
Senior United States District Judge

February 2, 2011
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: ONE HUNDRED THIRTY (130) MONTHS. This term consists of FORTY-SIX (46) MONTHS on Count 1 of the indictment, and EIGHTY-FOUR (84) MONTHS on Count 2, to run consecutively.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____ , with a certified copy of this Judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of FIVE (5) YEARS. This term consists of THREE (3) YEARS on Count 1 of the indictment, and FIVE (5) YEARS on Count 2, all to run concurrently.

The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain

from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or restitution obligation, it is a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

STANDARD CONDITIONS OF SUPERVISION

The defendant shall comply with the standard conditions that have been adopted by this court set forth below:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the officer;

4) the defendant shall support his or her depend[e]nts and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or any narcotic or other controlled substance or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer for a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While on supervised release, pursuant to this Judgment, the defendant shall also comply with the following additional special conditions:

1) The defendant shall not incur new credit card charges or open additional lines of credit without the approval of the probation officer.

2) The defendant shall provide the probation officer with access to requested financial information.

3) The defendant shall participate in a program approved by the Probation Office for substance abuse, which program may include residential treatment and testing to determine whether the defendant has reverted to the use of drugs or alcohol, with the cost to be paid by the defendant, all as directed by the probation officer.

4) Upon completion of his term of imprisonment, the defendant is to be surrendered to a duly-authorized immigration official of the Department

of Homeland Security Bureau of Immigration and Customs Enforcement for deportation in accordance with established procedures provided by the Immigration and Naturalization Act, 8 U.S.C. Section 1101 et seq. As a further condition of supervised release, if ordered deported, the defendant shall remain outside the United States.

5) The defendant shall pay the balance owed on any court-ordered financial obligations in monthly installments of not less than TWO HUNDRED AND NO/100 ($200.00) DOLLARS, or of TWENTY-FIVE (25) PERCENT of his gross income, whichever is greater, beginning SIXTY (60) DAYS after supervision begins until paid in full.

6) As directed by the probation officer, the defendant shall apply monies received from income tax refunds, lottery winnings, inheritances, judgments, and any anticipated or unexpected financial gains to the outstanding court-ordered financial obligation.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on Sheet 6.

Count	Assessment	Fine	Restitution
One	$100.00	$0.00	$13,201.99
Two	$100.00		
TOTALS:	**$200.00**	**$0.00**	**$13,201.99**

No fines have been imposed in this case.

The defendant must make restitution (including community restitution) to the following payees in the

amount listed below. If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. Section 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Count	Total Loss	Restitution Ordered	Priority or Percentage
Mapco/East Coast Store No. 4064, 6460 Boydton Plank Road, Petersburg, VA 23803	One	$13,201.99	$13,201.99	100%
TOTALS:		$13,201.99	$13,201.99	

Payments of Restitution are to be made payable to Clerk, U.S. District Court. The defendant shall be made jointly and severally with Valencia Jones, Docket Number 3:10CR194.

The Court determined that the defendant does not have the ability to pay interest and it is ordered that the interest requirement is waived for the restitution

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

Lump sum payment of $13,401.99 due immediately, balance due in accordance with below:

Payment in equal monthly installments of $200.00, or of 25 percent of his gross income, whichever is greater, over a period of years, to commence 60 days after release from imprisonment to a term of supervision.

The special assessment shall be due in full immediately.

The restitution shall be paid during the period of supervised released [sic].

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of the Court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment (2) restitution principal (3) restitution interest (4) fine principal (5) fine interest (6) community restitution (7) penalties and (8) costs, including cost of prosecution and court costs.

Nothing in the court's order shall prohibit the collection of any judgment, fine, or special assessment by the United States.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-4208

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ALLEN RYAN ALLEYNE,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert E. Payne, Senior District Judge. (3:10-cr-00134-REP-1)

Submitted: November 30, 2011
Decided: December 15, 2011.

Before WILKINSON, KING, and AGEE, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Michael S. Nachmanoff, Federal Public Defender, Mary E. Maguire, Assistant Federal Public Defender,

Patrick L. Bryant, Appellate Attorney, Richmond, Virginia, for Appellant. Neil H. MacBride, United States Attorney, Michael R. Gill, Assistant United States Attorney, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Allen Ryan Alleyne appeals his conviction and resulting 130-month custodial sentence. A federal jury found Alleyne guilty of robbery affecting commerce in violation of 18 U.S.C. §§ 1951(a), 2 (2006) and use or carry of a firearm during and in relation to a crime of violence in violation of 18 U.S.C. §§ 924(c), 2 (2006). We affirm the judgment.

Alleyne first argues that the evidence was insufficient to support either of his convictions. We review the denial of a motion for a judgment of acquittal de novo. *United States v. Smith*, 451 F.3d 209, 216 (4th Cir. 2006). A defendant challenging the sufficiency of the evidence faces a heavy burden. *United States v. Beidler*, 110 F.3d 1064, 1067 (4th Cir. 1997). The verdict of a jury must be sustained "if, viewing the evidence in the light most favorable to the prosecution, the verdict is supported by 'substantial evidence.'" *Smith*, 451 F.3d at 216. Substantial evidence is "evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable

doubt." *Id.* (internal quotation marks omitted). "Reversal for insufficient evidence is reserved for the rare case where the prosecution's failure is clear." *Beidler*, 110 F.3d at 1067 (internal quotation marks omitted).

Importantly, we "do not review the credibility of the witnesses and assume that the jury resolved all contradictions in the testimony in favor of the government." *United States v. Foster*, 507 F.3d 233, 245 (4th Cir. 2007). We are mindful that "the jury, not the reviewing court, weighs the credibility of the evidence and resolves any conflicts in the evidence presented." *Beidler*, 110 F.3d at 1067 (internal quotation marks and brackets omitted).

Alleyne fails to persuade us that the evidence against him was insufficient to sustain his convictions. He claims that the only witness who connected him to the robbery was inherently incredible. We refuse to substitute our own credibility assessment for that of the jury. Moreover, independent evidence corroborated much of the witness' testimony. Although no direct testimony established that he participated in the use of the firearm, such an inference was reasonable given Alleyne's participation in the planning and execution of the robbery. Alleyne's sufficiency of the evidence arguments lack merit.

Alleyne contends that he was convicted under a theory of aiding and abetting liability despite an unambiguous charge in the indictment that he acted as the principal. He claims that the Government's

presentation of evidence and the court's jury instructions on aiding and abetting liability constructively amended the indictment.

"A constructive amendment to an indictment occurs when either the government (usually during its presentation of evidence and/or its argument), the court (usually through its instructions to the jury), or both, broadens the possible bases for conviction beyond those presented by the grand jury." *United States v. Floresca*, 38 F.3d 706, 710 (4th Cir. 1994). "A constructive amendment is a fatal variance because the indictment is altered to change the elements of the offense charged, such that the defendant is actually convicted of a crime other than that charged in the indictment." *United States v. Randall*, 171 F.3d 195, 203 (4th Cir. 1999) (internal quotation marks omitted). A constructive amendment is error per se, and, given the Fifth Amendment right to be indicted by a grand jury, "must be corrected on appeal, even when not preserved by objection." *Floresca*, 38 F.3d at 714.

"Because the aiding and abetting provision [18 U.S.C. § 2] does not set forth an essential element of the offense with which the defendant is charged or itself create a separate offense, aiding and abetting liability need not be charged in an indictment." *United States v. Ashley*, 606 F.3d 135, 143 (4th Cir. 2010). A defendant "may be convicted of aiding and abetting under an indictment which charges only the principal offense." *United States v. Duke*, 409 F.2d 669, 671 (4th Cir. 1969).

We do not find that Alleyne's indictment was constructively amended during trial. The indictment specifically charged violation of 18 U.S.C. § 2 (2006), thereby putting Alleyne on notice of the Government's aiding and abetting theory. *See United States v. Robinson*, 956 F.2d 1388, 1394-95 (7th Cir. 1992). He was not convicted of a crime other than that charged in the indictment.

Nor do we find that the presentation of the aiding and abetting theory of liability constituted a prejudicial variance. No impermissible prejudice occurs if "the indictment provides the defendant with adequate notice of the charges against him and is sufficient to allow the defendant to plead it as a bar to subsequent prosecutions." *United States v. Redd*, 161 F.3d 793, 795-96 (4th Cir. 1998). Alleyne was indisputably on notice of the Government's intention to pursue an aiding and abetting theory of liability before his trial. Alleyne has not alleged that the indictment is insufficient to bar re-prosecution against him. We do not find a prejudicial variance on these facts.

Alleyne's final appellate argument is that the district court erred by holding him responsible at sentencing for brandishing a firearm. The court's finding elevated Alleyne's mandatory minimum sentence for the firearm conviction from five years to seven years pursuant to 18 U.S.C. 924(c). We review a district court's factual findings at sentencing for clear error. *United States v. Pauley*, 289 F.3d 254, 258 (4th Cir. 2002).

We first note, as Alleyne has conceded, that Supreme Court precedent forecloses any argument that Alleyne's constitutional rights were violated by the district court's finding that he was accountable for brandishing the firearm despite the jury's finding that he was not guilty of that offense. *Harris v. United States*, 536 U.S. 545, 556 (2002). We do not find the district court's finding otherwise clearly erroneous.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED.

FILED: December 15, 2011

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11-4208
(3:10-cr-00134-REP-1)

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

ALLEN RYAN ALLEYNE

Defendant-Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

(ORDER LIST: 568 U.S.)

FRIDAY, OCTOBER 5, 2012

CERTIORARI GRANTED

* * *

11-9335 ALLEYNE, ALLEN R. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

* * *

PETITIONER'S BRIEF

RECORD AND BRIEFS

No. 11-9335

In The
Supreme Court of the United States

ALLEN RYAN ALLEYNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTION PRESENTED

Whether this Court's decision in *Harris v. United States*, 536 U.S. 545 (2002), should be overruled.

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OPINIONS BELOW

The unpublished opinion of the U.S. Court of Appeals for the Fourth Circuit appears at pages 73 to 78 of the Joint Appendix ("J.A."). The transcript of the sentencing hearing appears at pages 41 to 63 of the Joint Appendix.

JURISDICTION

The district court exercised jurisdiction over this federal criminal case pursuant to 18 U.S.C. §3231. The Fourth Circuit had jurisdiction over Allen Alleyne's appeal pursuant to 28 U.S.C. §1291 and 18 U.S.C. §3742. That court issued its opinion and judgment on December 15, 2011. J.A. 73. Mr. Alleyne did not seek rehearing. On March 14, 2012, he filed his petition for a writ of certiorari, which this Court granted on October 5, 2012. J.A. 80. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation." U.S. Const. amend. VI.

As pertinent to this case, 18 U.S.C. §924(c)(1)(A) provides that

> any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;
>
> (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and
>
> (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

The full text of these constitutional and statutory provisions are reprinted in an appendix to this brief. *See* App., *infra*, 1a *et seq.*

STATEMENT

Title 18, United States Code, section 924(c)(1)(A) makes it a crime to use or carry a firearm during and in relation to a crime of violence. The basic offense is punishable by a "term of imprisonment of not less than 5 years." 18 U.S.C. §924(c)(1)(A)(i). If the carried firearm is brandished during the crime of violence, the defendant shall "be sentenced to a term of imprisonment of not less than 7 years." 18 U.S.C. §924(c)(1)(A)(ii). In *Harris v. United States*, 536 U.S. 545 (2002), this Court held that the Constitution permits a sentencing judge, rather than the jury, to make the finding by a preponderance of the evidence that a gun was brandished, even though the finding increased the minimum sentence. This was so, four Justices wrote, because the finding merely dictated the precise weight the court must give the fact of brandishing within a range already available to it, and thus did not implicate the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that facts that increase the range to which a defendant is exposed must be proved to a jury beyond a reasonable doubt. *Harris*, 536 U.S. at 568. Four Justices disagreed, and would have held that the rule of *Apprendi* applies to facts that raise the minimum of a range as well as to facts that raise the maximum. *Id.* at 579. One Justice

could not accept the distinction the plurality found between facts that raise the minimum and facts that raise the maximum "in terms of logic," but did not yet accept *Apprendi*, and thus declined to extend it to §924(c). *Id.* at 569.

In May 2010, Allen Alleyne was charged with committing robbery affecting interstate commerce, in violation of 18 U.S.C. §§1951(a) and 2, and with using, carrying, and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. §§924(c) and 2. The charges arose from the robbery of a convenience store manager as he drove to make a bank deposit. Mr. Alleyne's girlfriend, Valencia Jones, who worked at the convenience store, testified at trial that she suggested that Mr. Alleyne rob the manager and told him about the manager's deposit procedure. According to Ms. Jones, Mr. Alleyne and an accomplice staked out the store to learn the manager's habits and routes to the bank. On October 1, 2009, the two men watched as the manager left the store. They drove ahead of him, then stopped their car. The accomplice got out of the car and flagged down the manager as he approached. The manager stopped, thinking the men were having car trouble. The accomplice walked up to the manager's car, and when the manager rolled down his window, thrust a gun at the manager's neck and demanded the deposit bag. The manager surrendered it. The gunman went back to his car, got in the passenger side, and was driven away (the passenger had moved to the driver's side during the robbery). The manager

could not identify either man, but the government argued that Mr. Alleyne was the man who had remained in the car and drove it away. The gunman was never identified or charged. *See generally* Ct. App. J.A. 181-253 (testimony of store manager); *id.* at 274-454 (testimony of Valencia Jones).

At Mr. Alleyne's trial, the jury instructions and verdict form specifically directed the jury to determine whether he brandished a firearm during the robbery. J.A. 24, 40. Although it found him guilty of aiding and abetting the robbery and of using or carrying of a firearm during the robbery, the jury did not find him guilty of brandishing the firearm. J.A. 40.

Notwithstanding the jury's verdict, the government asked the district court to impose a seven-year mandatory minimum consecutive sentence because it believed that Mr. Alleyne reasonably foresaw that the accomplice would brandish a firearm. J.A. 53-59; Ct. App. J.A. 957-61. Mr. Alleyne objected. He acknowledged *Harris*'s ruling that brandishing was a sentencing factor that could be found by the sentencing judge by a preponderance of the evidence, but argued that *Harris* was inconsistent with the rule of *Apprendi* that facts that increase the range of punishment must be proved to a jury beyond a reasonable doubt. He also argued that the government could not prove that he reasonably foresaw that a gun would be brandished, even under a preponderance standard. Accordingly, Mr. Alleyne contended that the mandatory consecutive sentence on the §924(c) count should

be five, not seven, years of imprisonment. J.A. 43-52; Ct. App. J.A. 928-31.

The district court acknowledged that the jury "didn't find brandishing beyond a reasonable doubt." J.A. 45. It stated, "I don't like the role of being the reverser of juries." J.A. 48. It concluded, however, that it was bound by *Harris*. J.A. 48, 61. The court noted that it could "avoid the whole problem by finding [the sentencing range to be] five to life and sentencing him to seven," but rejected that idea as "intellectually dishonest." J.A. 58. The court then heard evidence and argument, and found, by a preponderance of the evidence, that Mr. Alleyne reasonably foresaw that the gunman would brandish a firearm during the robbery. J.A. 61-62. Based on that finding, the court imposed the mandatory consecutive seven-year sentence required by §924(c)(1)(A)(ii). J.A. 63.

Mr. Alleyne appealed, arguing, *inter alia*, that the seven-year sentence for brandishing was imposed in violation of his Fifth and Sixth Amendment rights. The Fourth Circuit rejected that argument, ruling that "Supreme Court precedent forecloses any argument that Alleyne's constitutional rights were violated by the district court's finding that he was accountable for brandishing the firearm despite the jury's finding that he was not guilty of that offense." J.A. 78. The court of appeals also found that the district court's fact findings were not clearly erroneous, and affirmed the sentence. J.A. 78.

This Court granted certiorari to consider whether it should overrule *Harris*. J.A. 80.

SUMMARY OF ARGUMENT

"[F]acts that increase the prescribed range of penalties to which a criminal defendant is exposed" must be submitted to a jury and established by proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (internal quotations omitted). That constitutional requirement was violated in this case. The sentencing judge increased the mandatory minimum punishment from five to seven years of imprisonment, based not on the jury's verdict that Allen Alleyne was guilty of using or carrying a firearm during or in relation to a crime of violence, but on the judge's own fact-finding by a preponderance of the evidence that the firearm was brandished during the offense. The judge did so in reliance on the decision of a plurality of this Court in *Harris v. United States*, 536 U.S. 545 (2002). *Harris*, and its predecessor, *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), permit judges to make findings about so-called "sentencing factors," even where those facts trigger mandatory minimum prison sentences.

Harris and *McMillan* were wrongly decided and should be overruled. As *Apprendi* made clear, any fact that gives rise to a harsher range of punishment than the range for the offense established by the jury's verdict must be submitted to the jury and proved beyond a reasonable doubt. The *Harris* plurality's

primary error was its assertion that the sentencing range available to the judge did not change after a finding of brandishing. In fact, in this case, the judge could have imposed as little as five years' imprisonment based on the jury's verdict, but once he found "brandishing"—by only a preponderance of the evidence—he had no discretion to impose fewer than seven years in prison. Accordingly, the "range of penalties" to which Mr. Alleyne was exposed was higher than the jury's verdict authorized.

Even at the time it was decided, *McMillan* represented a break from the historical treatment of facts triggering increases in the absolute limits of punishment. The anomaly of its rule was fully revealed by this Court's later Fifth and Sixth Amendment jurisprudence, in particular, *Apprendi v. New Jersey*. The anomaly could have been—but, narrowly, was not—rectified in *Harris*. The doctrine of *stare decisis* should not prevent the Court from rectifying it now. The force of *stare decisis* is at its weakest when, as here, the constitutional decision can no longer withstand scrutiny. This Court should have overruled *McMillan* in *Harris*, and must do so now.

As an alternative, this Court could avoid a constitutional ruling by reading §924(c)(1)(A) either to state offenses with fixed-term sentences, rather than implied life maximums, or to establish three crimes, with "brandishing" and "discharging" as elements of aggravated offenses. The first alternative arises from the principle that courts cannot read punishment ranges into statutes by implication; Congress must

state them with specificity. Basic principles of due process and fair notice require that a defendant know what penalties he faces. Because this Court cannot add words that Congress never included in a criminal statute, the best reading of §924(c)(1)(A) is that it states three fixed prison terms for three different offenses. The second alternative is supported by legislative intent. Application of the five-factor test this Court has used to interpret §924(c) demonstrates that Congress intended brandishing to be an element of a separate, aggravated offense. Under either of these constructions of the statute, Mr. Alleyne's sentence is infirm and must be reversed.

ARGUMENT

I. THIS COURT SHOULD OVERRULE *HARRIS V. UNITED STATES* BY HOLDING THAT ANY FACT MANDATING GREATER PUNISHMENT THAN A COURT WOULD OTHERWISE HAVE DISCRETION TO IMPOSE MUST BE CHARGED IN AN INDICTMENT, SUBMITTED TO A JURY, AND PROVED BEYOND A REASONABLE DOUBT.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that facts that increase the range of punishment to which a criminal defendant is exposed invoke the rights to trial by jury and proof beyond a reasonable doubt. That holding, the Court recognized, meant that one day it would have to reconsider the ruling in *McMillan v. Pennsylvania*, 477 U.S. 79

(1986), that facts that trigger a mandatory minimum sentence may be found by a judge by a preponderance of the evidence. That day seemed to have come ten years ago, when the Court considered *Harris v. United States*, 536 U.S. 545 (2002). *Harris* ended in a split decision that left *McMillan* in place, even though a majority of the Court thought it contrary to the rule and logic of *Apprendi*.

This case again brings the viability of the *McMillan* rule up for judgment. The Court should hold it incompatible with this country's deeply rooted understanding that juries alone can find facts that expose criminal defendants to additional punishment. That understanding is older than our nation, and the Framers embedded it in the Sixth Amendment. It is equally well-settled that facts that must be proved to the jury must be proved beyond a reasonable doubt, a right protected by the Fifth Amendment. The *Harris* plurality rule did not disagree with these basic constitutional principles. Instead, it said that a fact supporting a mandatory minimum sentence did not change the statutorily prescribed penalty range. That belief was incorrect then and is incorrect now. A mandatory minimum sentence changes the range of permissible sentences by increasing the punishment the judge would otherwise have discretion to impose. Because the fact that triggers the higher penalty is a fact that is essential to the punishment that can be imposed, it must be submitted to the jury and proved beyond a reasonable doubt. *Harris* and *McMillan* were incorrectly decided, and none of the factors that

might allow an incorrect ruling to stand in the name of *stare decisis* are present in this case. They should be overruled.

A. Before And After *McMillan v. Pennsylvania*, This Court Has Affirmed That Juries Must Find Facts That Increase The Prescribed Range Of Penalties.

"'[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1999) (Stevens, J., concurring)). The historical foundation for these principles "extends down centuries into the common law." *Apprendi*, 530 U.S. at 477. The Fifth and Sixth Amendments express these principles and their protections: the rights of an accused to notice, to indictment by a grand jury, to trial by a petit jury, and to be found guilty only upon proof beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 476-77; *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

These rights place constitutional limits on the discretion of a legislature to define criminal offenses. A legislature may not define an offense to relieve the government of its Fifth Amendment burden of proving

an element beyond a reasonable doubt. *See Mullaney*, 421 U.S. at 698. Nor may a legislature remove from the jury's consideration facts that set or increase the range of punishment to which a defendant is exposed. *See Apprendi*, 530 U.S. at 476-85; *Jones*, 526 U.S. at 243-48. A legislature may not avoid these limits by labeling components of an offense as "sentencing factors." The relevant inquiry is not one of form, but of effect. *See Apprendi*, 530 U.S. at 484-85, 494; *Ring v. Arizona*, 536 U.S. 584, 604-05 (2002). When a statute "annexes a higher degree of punishment" based on a specified fact, that fact must be charged in the indictment and proved to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 480 (internal citation and punctuation omitted).

McMillan v. Pennsylvania, 477 U.S. 79 (1986), deviated from these principles. A bare majority of the Court coined the term "sentencing factor" to refer to a fact that was not charged in an indictment or proved to a jury beyond a reasonable doubt but that, once found by a judge by a preponderance of the evidence at sentencing, mandates a minimum sentence more severe than the judge otherwise could impose. *See* 477 U.S. at 81-82, 86.

The four dissenting Justices would have held that when a state attaches criminal penalties to specific facts, those facts are elements that must be proved beyond a reasonable doubt at trial. 477 U.S. at 98, 103 (Stevens, J., dissenting); *id.* at 94 (Marshall, J., dissenting). They read *Winship*'s reasonable doubt requirement to apply whenever the "State threatens

to stigmatize or incarcerate an individual for engaging in prohibited conduct." *Id.* at 98 (Stevens, J., dissenting) (citing *Winship*, 397 U.S. at 363-64). The visible gun possession at issue in *McMillan* was prohibited conduct, conduct for which Pennsylvania law required a greater term of incarceration. Conduct so stigmatized and punished had to be proved beyond a reasonable doubt because it was a "'fact necessary to constitute the crime'" under *Winship*'s rule. 477 U.S. at 103 (Stevens, J., dissenting).

Justice Stevens also drew on *Patterson v. New York*, 432 U.S. 197 (1977), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), to demonstrate that facts that expose a defendant to greater stigma or punishment must be proved beyond a reasonable doubt. *McMillan*, 477 U.S. at 99-101 (Stevens, J., dissenting). In *Patterson*, the Court held that a state did not have to disprove the existence of a mitigating fact. 432 U.S. at 210. In *Mullaney*, the Court held that a state could not presume a fact (the presence of malice aforethought in every homicide) that increased the punishment and stigma attached to the offense. 421 U.S. at 701. The Court found that the presumption violated due process. *Id.* at 704. The due process protections of *Winship* would be undermined, the Court reasoned, if the state could evade the beyond-a-reasonable-doubt proof requirement by "redefin[ing] the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Id.* at 698. The visible gun possession that triggered the mandatory minimum sentence

in *McMillan*, Justice Stevens reasoned, was an example of exactly this type of prohibited redefinition. *McMillan*, 477 U.S. at 98-103 (Stevens, J., dissenting).

After *McMillan*, the Court returned to the fundamental principles underlying the Fifth and Sixth Amendments. In *Jones v. United States*, it construed the federal carjacking statute, which set forth escalating maximum penalties, *see* 18 U.S.C. §2119, to establish elements of aggravated crimes to be charged in an indictment and proved to a jury beyond a reasonable doubt, not mere sentencing factors to be raised at sentencing and proved to a judge by a preponderance of the evidence. 526 U.S. at 232-39, 252. The Court found that the latter reading would raise constitutional doubt under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment. *Id.* at 239-44 & n.6. The Court concluded that the "history bearing on the Framers' understanding of the Sixth Amendment" did not "demonstrate[] an accepted tolerance for exclusively judicial factfinding to peg penalty limits." *Id.* at 244. The Court further found that the "diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with . . . earlier controversies"—hard fought controversies that ended with the jury in control of both finding the facts and the ultimate verdict, *id.* at 245-48—"to raise a genuine Sixth Amendment issue not yet settled." *Id.* at 248. In concurring opinions, two Justices stated their view that the issue *was*

settled: "[I]t is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 253 (Scalia, J., concurring); *see id.* at 252-53 (Stevens, J., concurring) (stating this principle and noting that it "encompasses facts that increase the minimum as well as the maximum permissible sentence").

The next year, in *Apprendi*, the Court confirmed and applied the rules expressed in *Jones*:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Id. at 490 (quoting *Jones*, 526 U.S. at 252-53 (opinion of Stevens, J.) and *id.* at 253 (opinion of Scalia, J.)). In doing so, the Court emphasized the historical link between verdict and judgment—whether punishment was fixed or a prescribed range—that began before the founding and continued up to *McMillan*. 530 U.S. at 478-85. The Court described *McMillan*'s distinction

between "elements" and "sentencing factors" as "constitutionally novel and elusive." *Id.* at 494.

As in *Jones*, however, *Apprendi* did not present the occasion to overrule *McMillan* because the fact at issue raised only the maximum of the sentencing range, not the minimum. The Court limited *McMillan*'s holding to cases that do not involve an increase in the maximum sentence authorized by the jury's verdict. 530 U.S. at 487 n.13. The Court recognized that even this "narrower holding" left McMillan at odds with the rules it had adopted in *Apprendi*, but it left for another case the question whether *McMillan* should be overruled. *Id.*

In the dozen years since *Apprendi*, the principles it established have been reaffirmed a number of times, resulting in the overturning of state sentencing guidelines that permitted judges to increase the maximum sentence, *Blakely v. Washington*, 542 U.S. 296 (2004), the end of mandatory federal sentencing guidelines, *United States v. Booker*, 543 U.S. 220 (2005), and a requirement that the jury find the facts necessary to the assessment of criminal fines, *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012). *Apprendi* has now been the law for some time, and the day has come when *Harris* and *McMillan* can no longer stand. *See United States v. O'Brien*, 130 S. Ct. 2169, 2183 & n.6 (2010) (Stevens, J., concurring).

B. *McMillan* And *Harris* Directly Conflict With *Apprendi v. New Jersey*, And *Harris*'s Explanations To The Contrary Are Legally, Logically, And Factually Flawed.

1. *McMillan* Broke With The Traditional Understanding Of What Constitutes An Element.

McMillan broke from the fundamental principle that any fact that exposes a defendant to a greater punishment than the court could otherwise impose must be charged in an indictment and proved to a jury beyond a reasonable doubt. At issue was a Pennsylvania statute requiring the judge to impose a five-year minimum sentence if the judge found at sentencing that the defendant "visibly possessed a firearm" during the commission of a listed felony. 477 U.S. at 81-82 & n.1. In each of four prosecutions under the statute, the sentencing judge had held the statute unconstitutional and imposed a sentence below the mandatory five-year sentence. *Id.* at 82. The Pennsylvania Supreme Court reversed, holding that the statute complied with the Due Process Clause because, it said, the reasonable-doubt standard "has always been dependent on how a state defines the offense." *Id.* at 83 (internal citations and punctuation omitted). According to the state court, the statute did not create an element because it neither increased the maximum sentence for the enumerated felony nor authorized a separate sentence; it "merely require[d] a minimum sentence of five years, which may be more or less than the minimum sentence that might

otherwise have been imposed," and "in no way relieve[d] the prosecution of its burden of proving guilt." *Id.* (internal citations and punctuation omitted).

Five Justices endorsed Pennsylvania's novel approach. While acknowledging that "there are obviously constitutional limits beyond which the States may not go in this regard," the Court said that a legislature's definition of the elements of the offense "usually dispositive," 477 U.S. at 85 (internal citations and punctuation omitted), and this statute did not cross the "constitutional line," *id.* at 91. It did not raise the "specter" of being structured "to 'evade' the commands of *Winship*" or give the "impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88-89. According to the majority, the statute did not "expose[ ] [defendants] to greater or additional punishment," but "operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding." *Id.* at 89. In other words, "[i]t simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor." *Id.* at 89-90. The Court thus rejected the petitioners' claims under the Due Process Clause. For its brief discussion of their Sixth Amendment claim, the majority referred to its conclusion that a state may properly treat visible possession of a firearm "as a sentencing consideration and not an element," and noted that "there is no Sixth

Amendment right to jury sentencing." *Id.* at 93 (citing *Spaziano v. Florida*, 468 U.S. 447, 459 (1984)).[1]

Four Justices dissented. As Justice Stevens wrote, "the constitutional significance of the special sanction cannot be avoided by the cavalier observation that it merely 'ups the ante' for the defendant," when the finding mandated punishment greater than would have been imposed without the finding. 477 U.S. at 103-04 (Stevens, J., dissenting). The dissenting Justices would have held that because Pennsylvania had provided that a "specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a fact necessary to constitute the crime." *Id.* at 103 (internal citations and punctuation omitted); *id.* at 94 (Marshall, J., dissenting).

2. *McMillan* Collided With *Apprendi* In *Harris*.

Apprendi confirmed that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," 530 U.S. at 490, and endorsed the following rule: "'[I]t is unconstitutional for a

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[1] As this Court later made clear, *McMillan*'s reliance on *Spaziano* was misplaced. *See Jones*, 526 U.S. at 250 (noting that *Spaziano* did not resolve the question because it "contains no discussion of the sort of factfinding before us in this case").

legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Id.* (quoting *Jones*, 526 U.S. at 252-53 (opinion of Stevens, J.); *id.* at 253 (opinion of Scalia, J.). A fact that increases a mandatory minimum falls comfortably within that rule because it increases the prescribed range of penalties to which the defendant is exposed. Such a fact must therefore be alleged in an indictment and proved to a jury beyond a reasonable doubt. *Apprendi* recognized that *McMillan* was a departure from this Court's previous decisions, and potentially conflicted with *Apprendi* itself. 530 U.S. at 485-87 & n.13. After limiting *McMillan* to cases not involving sentences above the statutory maximum for the offense established by the jury's verdict, the Court "reserve[d] for another day" the question whether to overrule *McMillan* entirely. *Id.* at 487 n.13.

The opportunity presented itself in *Harris v. United States*, 536 U.S. 545 (2002), which, as here, involved the "brandishing" provision of 18 U.S.C. §924(c)(1)(A). The threshold question was whether Congress had made brandishing an element or a sentencing factor. *Id.* at 551-52. The "principal question" was "whether *McMillan* stands after *Apprendi*." *Id.* at 550. The answer was, "barely."

Four Justices concluded that *McMillan* was consistent with *Apprendi* because "the jury's verdict has authorized the judge to impose the minimum with

or without the finding." *Harris*, 536 U.S. at 557 (plurality opinion). In reaching this conclusion, the plurality followed *McMillan*'s rationale that a fact supporting a mandatory minimum does not increase the prescribed range of penalties to which a defendant is exposed, and is no different from a fact courts have always considered in their discretion within the statutory range for the offense of conviction. *See id.* at 557-68.

Four Justices, however, concluded that *McMillan* could not "coexist with the logical implications of the Court's later decisions in *Apprendi* and *Jones*," *Harris*, 536 U.S. at 582 (Thomas, J., dissenting), finding the plurality's reasoning to be flawed, *id.* at 574-83, and observing that "[w]hether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed," *id.* at 579. Justice Breyer agreed that *Apprendi* could not be "easily distinguish[ed] . . . from this case in terms of logic." *Id.* at 569 (Breyer, J., concurring). Nonetheless, he voted to allow *McMillan* to survive because he continued to believe that *Apprendi* was wrongly decided. *Id.* at 569-72.[2]

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[2] Justice Breyer recently reiterated that "*Apprendi* does cover mandatory minimums," and recognized that *Apprendi* is "the law and has been for some time." *O'Brien*, 130 S. Ct. at 2183 n.6 (Stevens, J., concurring) (quoting Justice Breyer's comments at oral argument).

3. The *Harris* Plurality's Flawed Reasoning Erroneously Preserved *McMillan*.

The *Harris* plurality asserted that a mandatory minimum "sentencing factor" not only "[does] not increase 'the penalty for a crime beyond the prescribed statutory maximum,'" but does not "'alter the congressionally prescribed range of penalties to which a criminal defendant is exposed.'" 536 U.S. at 563 (quoting *Apprendi*, 530 U.S. at 490, in turn quoting *Jones*, 526 U.S. at 253 (Stevens, J., concurring). It concluded that brandishing is not an element that must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt because "the jury's verdict has authorized the judge to impose the minimum with or without the finding." 536 U.S. at 557. In reaching these conclusions, the *Harris* plurality, like *McMillan* before it, denied that a fact that increases a mandatory minimum increases the prescribed range of penalties to which a defendant is exposed, and asserted that a fact that increases a mandatory minimum is no different from a fact that judges have discretion to consider *within* the statutory range established by the jury's verdict. The plurality's reasoning was flawed on several grounds.

1. The plurality began by explaining that when statutes were enacted in the 19th century providing judges with "discretion within a permissible range," "[j]udicial factfinding in the course of selecting a sentence within the authorized range [did] not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments." 536

U.S. at 558. Agreeing with *McMillan* that "the statute 'simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor,'" *id.* at 559 (quoting *McMillan*, 477 U.S. at 89-90), the plurality concluded that these facts "have been the traditional domain of judges; they have not been alleged in the indictment or proved beyond a reasonable doubt." *Id.* at 560.

The plurality was wrong in equating facts that, if found by a judge by a preponderance of the evidence, require the judge to impose a minimum sentence greater than that prescribed for the offense of conviction with facts that a court may consider in its discretion within the prescribed range for the offense of conviction. As this Court explained in *Apprendi*, "since the 19th-century shift in this country" to statutes "providing judges discretion within a permissible range," 530 U.S. at 481, judges were permitted "to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment *within the range* prescribed by statute," *id.*, but "regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature," *id.*, and "'not to exceed the limits fixed for what . . . is within the allegation and the verdict.'" *Id.* at 482 n.9 (quoting 1 J. Bishop, Criminal Law §948 (9th ed. 1923)). The *Harris* plurality itself quoted Bishop's 1872 treatise, which, in describing statutes that had no mandatory minimums, made this very point. 536

U.S. at 561-62 (quoting 1 J. Bishop, Law of Criminal Procedure §85, at 54 (2d ed. 1872)).

Until *McMillan*, there was no such thing as a "sentencing factor" that, if found by the judge, increased the punishment the judge otherwise had discretion to impose. *See Apprendi*, 530 U.S. at 485; *id.* at 518 (Thomas, J., concurring). As Justice Stevens explained in his concurrence in *O'Brien*, a "'sentencing factor' may serve two very different functions. As a historical matter, the term has described a fact that a trial judge might rely upon when choosing a specific sentence within the range authorized by the legislature. In that setting, the judge has broad discretion in determining both the significance of the factor and whether it has been established by reliable evidence." 130 S. Ct. at 2181 (Stevens, J., concurring). "Since [the 1970s] the term has been used to describe facts, found by the judge by a preponderance of the evidence, that have the effect of imposing mandatory limits on a sentencing judge's discretion," and as such, is "the functional equivalent of an element of the criminal offense itself." *Id.* By equating the latter with the former, *McMillan* "broke from the 'traditional understanding' of crime definition, a tradition that 'continued well into the 20th century.'" *Harris*, 536 U.S. at 580 (Thomas, J., dissenting) (internal citation omitted).

2. The *Harris* plurality found it constitutionally permissible for a judge to find the latter kind of "sentencing factor" by denying that the finding increases the statutorily prescribed range of penalties authorized

by the jury's verdict. *See* 536 U.S. at 577-78 (Thomas, J., dissenting). It said that the "sentencing factor" in *McMillan* did not "alter the congressionally prescribed range of penalties" but "merely required the judge to impose a specific sentence *within the range* authorized by the jury's finding that the defendant was guilty." *Id.* at 563-64 (internal citations and punctuation omitted).[3] Similarly, the plurality appeared to deny that mandatory minimum provisions are mandatory, stating that the judge "may select any sentence within the range, based on facts not alleged in the indictment or proved to the jury—even if those facts . . . *persuade* the judge to *choose* a much higher sentence than he or she otherwise would have imposed." *Id.* at 566 (emphasis added); *see also id.* at 565 (describing these facts as "*guiding* judicial discretion below the statutory maximum") (emphasis added); *id.* at 567 (describing mandatory minimums as both "channel[ing] judicial discretion" and "requiring defendants to serve minimum terms after judges make certain factual findings").

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[3] *See also, e.g.*, *id.* at 558-59 (asserting that mandatory minimum statutes "maintained the statutory ranges and the judge's factfinding role," and merely "assigned a uniform weight to factors judges often relied upon when choosing a sentence"); *id.* at 559 (asserting that when a statute "'dictate[s] the precise weight to be given [a] factor,'" this does not "'expose [defendants] to greater or additional punishment'") (quoting *McMillan*, 477 U.S. at 87-88, 89-90); *id.* at 560 (asserting that facts "do not become" elements "merely because legislatures require the judge to impose a minimum sentence when those facts are found").

3. Only the four Justices in the *Harris* plurality accepted this logic. *See* 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). The Justices who dissented in *Harris*, as well as the Justices who had dissented in *Apprendi*, recognized that a sentencing "range" has two outer limits, and that when a fact increases a mandatory minimum, it increases the lower limit of the "range." *See Harris*, 536 U.S. at 580 (Thomas, J., dissenting) ("[T]he absolute statutory limits of the punishment change, constituting an increased penalty."); *Apprendi*, 530 U.S. at 533 (O'Connor, J., dissenting) (recognizing that "any fact that increases or alters *the range* of penalties to which a defendant is exposed . . . by definition, must include increases or alterations to either the minimum or maximum penalties"); *see also* Webster's Third New International Dictionary Unabridged (2002) (defining "range" as a "sequence, series, or scale *between limits*; the *limits* of a series: the distance or extent between *possible extremes*") (emphasis added).

In fact, mandatory minimums forbid the judge to impose any lower sentence except in limited circumstances.[4] In this case, assuming that the statutory

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[4] The only possible relief from §924(c)'s mandatory minimums is a government motion for a downward departure based on substantial assistance in the investigation or prosecution of another. *See* 18 U.S.C. §3553(e). In addition, in drug trafficking cases only, defendants may be eligible for relief under the "safety valve" statute. *See* 18 U.S.C. §3553(f).

maximum is life, *but see infra* Part II.A, the "penalty range . . . is five years to life" without a finding that the firearm was brandished, but "becomes harsher, seven years to life" with such a finding. *Harris*, 536 U.S. at 575-76 (Thomas, J., dissenting). Thus, "[t]he fact that a defendant brandished a firearm indisputably alters the prescribed range of penalties to which he is exposed under 18 U.S.C. §924(c)(1)(A)." *Id.* at 575. "Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Id.* at 579.

The idea that brandishing is not the domain of the jury because "the jury's verdict has authorized the judge to impose the minimum with or without the finding," 536 U.S. at 557, rings particularly hollow here, where the jury declined to find Mr. Alleyne guilty of brandishing, and the district court would not have imposed the consecutive seven-year sentence but for its finding by a preponderance of the evidence that Mr. Alleyne reasonably foresaw that a firearm would be brandished. *See* J.A. 58 (declining to "avoid the whole problem by finding five to life and sentencing him to seven" because "I don't think I have that discretion" to be "dishonest intellectually"). Once the court found by a preponderance of the evidence that the gun had been brandished, it was powerless to impose anything less than seven years in prison. There can be no question that the judge's fact-finding, by a preponderance of the evidence and in opposition to the jury's verdict, increased the *range* of penalties

to which Mr. Alleyne was subject. It defies reality to say that the provision merely "persuade[d] the judge to choose a much higher sentence than he . . . otherwise would have imposed." *Harris*, 536 U.S. at 566.

In most cases, defendants would not have received the same sentence with or without a finding of brandishing. The guideline "range" for a conviction under §924(c) *is* the mandatory minimum,[5] and courts rarely sentence above that "range." *See O'Brien*, 130 S. Ct. at 2177-78 (noting that "most courts impose the mandatory minimum of 7 years' imprisonment for brandishing a nonspecific weapon"); *see also Harris*, 536 U.S. at 578 (Thomas, J., dissenting).

In sum, the reality is that a mandatory minimum raises the limit below which the judge has no discretion. This reality invokes "[t]he historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided . . . according to the facts reflected in the jury verdict alone." *Apprendi*, 530 U.S. at 482-83.

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[5] The guideline range is the statutory minimum term, except in cases in which the career offender guideline applies. *See* U.S.S.G. §2K2.4(b), (c); *id.* §5G1.2, comment. (n.3).

C. *McMillan* And *Harris* Failed To Examine The Historical Evidence, Which Demonstrates That A Fact That Increases A Mandatory Minimum Must Be Treated As An Element.

The *McMillan* Court did not examine the historical underpinnings of the rights to indictment and trial by jury, as this Court did later in *Jones* and *Apprendi*. For its conclusion that *McMillan* was on "firm historical ground," the *Harris* plurality relied on a lack of "extensive historical evidence showing that facts increasing the defendant's minimum sentence (but not affecting the maximum) have, as a matter of course, been treated as elements." 536 U.S. at 560, 561. It acknowledged that no "clear record" existed to that effect, because before the 20th century, courts were not "as a general matter" called upon to decide whether such facts had to be alleged in an indictment and proved to a jury. *Id.* at 560-61.

A lack of "extensive" or "clear" historical evidence regarding a particular practice before it was in use does not, of course, answer the question. *Harris*, 536 U.S. at 579 (Thomas, J., dissenting); *Jones*, 526 U.S. at 244. The historical evidence shows that, "however peculiar their details to our time and place," facts requiring a court to impose a minimum sentence, even if such facts do not increase the maximum sentence it may impose, may not be removed from the jury's

control. *See Jones*, 526 U.S. at 248.[6] "Looking to the principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested (rather than to the historical pedigree of mandatory minimums), there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting).

As this Court explained in *Jones*, the "history bearing on the Framers' understanding of the Sixth Amendment" does not "demonstrate[] an accepted tolerance for exclusively judicial factfinding to peg penalty limits." *Jones*, 526 U.S. at 244. In felony cases, fixed sentences were the norm, and the judge had no discretion but to pronounce the judgment required by law for the offense found by the jury. *See Apprendi*, 530 U.S. at 478-79 & n.4. There was no such thing as a "sentencing factor" that could elevate the punishment a judge was allowed or required to impose, and yet not be charged in an indictment and proved to a jury. *Jones*, 526 U.S. at 244.

The jury acted as a check on the "potential or inevitable severity of sentences" by asserting "a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or

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[6] Counsel for Mr. Alleyne understand that Families Against Mandatory Minimums, as *amicus curiae*, intends to file a brief discussing this point in more detail.

endowed a criminal conviction with particularly sanguinary consequences." *Jones*, 526 U.S. at 245. "This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as 'pious perjury' on the jurors' part." *Id.* (citing 4 W. Blackstone, Commentaries on the Laws of England 372, 238-39 (1769)); *see also Apprendi*, 530 U.S. at 479 nn.5-6. Efforts were made to bar jury trials and to limit the jury's role to pure facts and assign to the judge the ultimate question of whether the facts amounted to guilt. These efforts were strenuously resisted and ultimately failed, leaving the jury in control of finding the facts and applying the law to the facts. *Jones*, 526 U.S. at 245-48.

"That this history had to be in the minds of the Framers is beyond cavil." *Jones*, 526 U.S. at 247. And "[i]t is just as much beyond question that Americans of the period perfectly well understood the lesson that the jury right could be lost not only by gross denial, but by erosion." *Id.* at 247-48. *Apprendi* quoted a contributor to the ratification debates as "warning of the need 'to guard with the most jealous circumspection against the introduction of new, and arbitrary methods of trial, which, under a variety of plausible pretenses, may in time, imperceptibly undermine this best preservative of LIBERTY.'" 530 U.S. at 483 n.11 (quoting A [New Hampshire] Farmer, No. 3, June 6, 1788, quoted in The Complete Bill of Rights 477 (N. Cogan ed. 1997)).

Removing from the jury a fact requiring the imposition of a minimum sentence, no less than a fact requiring a fixed sentence, would surely have been regarded as an erosion, if not a gross denial, of the right to jury trial. The jury could not stand as a check against governmental abuse if it had no opportunity to acquit the defendant of a fact legislated by Parliament and charged by the prosecutor to prevent the judge from imposing any lower sentence. *Jones*, 526 U.S. at 245. Much less could the jury function as the "circuit breaker in the State's machinery of justice," *Blakely v. Washington*, 542 U.S. 296, 306 (2004), if the jury's acquittal of that fact could be disregarded by a judge complying with a statute enacted by Congress and invoked by the prosecutor.

The link between verdict and judgment continued from before the founding to well into the 20th century. Under the common law, all facts and circumstances affecting the punishment sought were required to be charged in an indictment and submitted to a jury. *Apprendi*, 530 U.S. at 478-79. The same held true when indictments were issued under statutes "annex[ing] a higher degree of punishment to a common-law felony, if committed under particular circumstances" that "mandat[ed] a particular punishment." *Id.* at 480 (internal citation and punctuation omitted). And when statutory ranges came into use in the 19th century, all facts and circumstances setting the "outer limits" of the "range" of punishment the judge could impose had to be charged and proved to a jury. *Id.* at 481-82 & n.10.

The *Harris* plurality, however, asserted that "[s]ince sentencing ranges came into use . . . the charged facts have simply made [defendants] aware of the 'heaviest punishment' they faced if convicted," and judges had "always considered uncharged 'aggravating circumstances' that, while increasing the defendant's punishment, have not 'swell[ed] the penalty above what the law has provided for the acts charged.'" 536 U.S. at 562 (quoting 1 J. Bishop, Law of Criminal Procedure §85, at 54 (2d ed. 1872)). On this basis, the plurality concluded that "the legislature's choice to entrust [these facts] to the judge does not implicate the 'competition . . . between judge and jury over . . . their respective roles' that is the central concern of the Fifth and Sixth Amendments." 536 U.S. at 562 (quoting *Jones*, 526 U.S. at 245).

The plurality was wrong. First, as Justice Thomas demonstrated in his concurrence in *Apprendi*, in cases involving the equivalent of modern-day mandatory minimums in the late 1800s, any aggravating circumstance that increased the range was required to be charged in an indictment and proved to a jury. *See Apprendi*, 530 U.S. at 504-05 (Thomas, J., concurring) (describing *Lacy v. State*, 15 Wis. *13, 1862 WL 951 (1862)); *id.* at 513 (describing *Garcia v. State*, 19 Tex. App. 389, 393, 1885 WL 6922 (1885)); *id.* at 514 (describing *Jones v. State*, 63 Ga. 141, 143, 1879 WL 2442 (1879)). In these cases, the aggravating facts "raised the whole range—both the top and bottom," but the courts, in holding that the facts were elements, made no distinction between changes in the

minimum and changes in the maximum. *Id.* at 522. "What mattered was simply the overall increase in the punishment provided by law." *Id.* As Justice Thomas argued, even if the defendant could have received the same sentence absent the mandatory minimum, the "expected punishment has increased as a result of the narrowed range and . . . the prosecution [was] empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish." *Id.* "The fact triggering the mandatory minimum is part of 'the punishment sought to be inflicted,'" "undoubtedly 'enters into the punishment' so as to aggravate it," and "is an 'ac[t] to which the law affixes . . . punishment.'" *Id.* at 522 (quoting 1 J. Bishop, Law of Criminal Procedure 50, §540, at 330 & §80, at 51 (2d ed. 1872)).

Second, as this Court noted in *Jones*, at the time of the founding, juries acted as a check on the "*potential or inevitable* severity of sentences" the judge was empowered to impose. 526 U.S. at 245 (emphasis added). If there is no opportunity for a jury to determine facts that increase the severity of the sentence, whether "potential or inevitable," the jury obviously cannot fulfill its role. Here, as a result of *McMillan* and *Harris*, Mr. Alleyne's sentence was increased from five to seven years based on a fact the jury did not find, clearly implicating the "competition . . . between judge and jury over the real significance of their respective roles." *Id.*

"The evidence . . . that punishment was, by law, tied to the offense . . . and the evidence that American

judges have exercised sentencing discretion within a legally prescribed range . . . point to a single, consistent conclusion: The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury." *Apprendi*, 530 U.S. at 483 n.10. The *Apprendi* Court noted "[t]he historic link between verdict and judgment and the consistent limitation on judges' discretion to operate within the limits of the legal penalties provided." *Id.* at 482. It found that this link "highlight[ed] the novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83. The same is true of a legislative scheme that removes from the jury the determination of a fact that, if found, exposes a defendant to a penalty exceeding the minimum he would receive if punished according to the facts reflected in the jury verdict. The same logic that animated the rights to notice, indictment, and jury trial of facts setting the maximum of the range applies to facts setting the minimum of the range. *Harris*, 536 U.S. at 579-80 (Thomas, J., dissenting).

McMillan and *Harris* broke the "historic link between verdict and judgment" that throughout history had guaranteed that any fact "expos[ing] a defendant to a punishment greater than that otherwise legally prescribed" must be submitted to a jury, *Apprendi*, 530 U.S. at 482-83 & n.10, and should therefore be overruled.

D. This Court Should Overrule *Harris* And Hold That Any Fact Mandating Greater Punishment Than A Court Would Otherwise Have Discretion To Impose Must Be Charged In An Indictment And Proved To A Jury Beyond A Reasonable Doubt.

"Not only was *McMillan* wrong the day it was decided, but its reasoning has been substantially undermined—if not eviscerated—by the development of [this Court's] Sixth Amendment jurisprudence in more recent years." *O'Brien*, 130 S. Ct. at 2182 (Stevens, J., concurring). The Court broke with tradition in *McMillan*, and it should mend that break by reaffirming *Apprendi* and overruling *McMillan* and *Harris*.

Under *Apprendi*, any fact "that increas[es] the prescribed range of penalties to which a criminal defendant is exposed" must be charged in an indictment and proved to a jury beyond a reasonable doubt. 530 U.S. at 490. *Harris*'s rule that a fact increasing a mandatory minimum is not subject to constitutional protections because "the jury's verdict has authorized the judge to impose the minimum with or without the finding," 536 U.S. at 557, ignores that the finding *requires* the judge to impose the minimum with no jury verdict or, as here, in opposition to a jury verdict. To the extent *Apprendi*'s rule has been avoided by strained interpretations of the terms "sentencing factor" and "range," the Court can easily obviate the problem.

Justice Thomas derived the following principle from scores of cases from the founding up to the middle of the 20th century, as well as from Bishop's 1872 treatise: "One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element." *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring); *see also id.* at 521 ("If a fact is by law the basis for imposing or increasing punishment—for establishing or increasing the prosecutor's entitlement—it is an element."); *Harris*, 536 U.S. at 575 (Thomas, J., dissenting) (same). Justice Stevens suggested that the Court "recognize that any fact mandating the imposition of a sentence more severe than a judge would otherwise have discretion to impose should be treated as an element of the offense." *O'Brien*, 130 S. Ct. at 2183 (Stevens, J., concurring).

The rules proposed by Justice Thomas and Justice Stevens, which are two sides of the same coin, would reflect the binding nature of mandatory minimums, as well as the historical, constitutional, and logical foundations of *Apprendi*. Combining those rules, any fact that entitles the prosecution to a kind, degree, or range of punishment more severe than the judge would otherwise have the discretion to impose must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt.

E. The Doctrine of *Stare Decisis* Does Not Prevent This Court From Overturning *Harris*.[7]

"*Stare decisis* is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828-29 (1991). When, as in this case, "the Court has wrongly decided a constitutional question, the force of *stare decisis* is at its weakest." *Harris*, 536 U.S. at 581 (Thomas, J., dissenting) (citing *Ring v. Arizona*, 536 U.S. 584, 608 (2002); *Agostini v. Felton*, 521 U.S. 203, 235 (1997)). *Stare decisis* does not prevent the Court from overruling precedent that is "unworkable or [] badly reasoned," *Payne*, 501 U.S. at 827; that has become "a positive detriment to coherence and consistency in the law," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989); that involves a critical anomaly, *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008); or that was closely decided or questioned by this Court, or questioned by other courts later, *Payne*, 501 U.S. at 828-30. Finally, where no practical impediment, such as detrimental reliance upon the earlier decision, counsels its application, *stare decisis* need not be followed. *See John R. Sand & Gravel Co.*, 552 U.S. at 139; *Lawrence v. Texas*, 539 U.S. 558, 577 (2003). Each of these considerations militates against applying *stare decisis* and in favor of overturning the *sui generis* decision in *Harris*.

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[7] Counsel for Mr. Alleyne understand that the Center on the Administration of Criminal Law, as *amicus curiae*, intends to file a brief that will discuss the continued viability of *Harris* in more detail.

As argued above, this Court's recent Sixth Amendment jurisprudence makes clear that *McMillan*, and, in turn, *Harris*, were wrongly decided. Because the decisions are inconsistent with that jurisprudence, they should be overruled. This Court has not hesitated to reconsider a decision when "intervening development of the law" has "removed or weakened [its] conceptual underpinnings." *Patterson*, 491 U.S. at 173. *Apprendi* did just that, making clear that any fact that increases the range of punishment for an offense must be presented to a jury and proven beyond a reasonable doubt. 530 U.S. at 490. This holding both revealed the weaknesses in, and undermined the rationale of, *McMillan*,[8] and thus *Harris*.

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[8] Indeed, as demonstrated above, the conceptual underpinnings of *McMillan* were problematic from the start. After *Apprendi*, those underpinnings became untenable. *See Harris*, 536 U.S. at 582 (Thomas, J., dissenting) (observing that, until *Harris*, it appeared that "no one seriously believed" that "*McMillan* could coexist with the logical implications of the Court's later decisions in *Apprendi* and *Jones*"). Certainly, the four dissenters in *Jones* and *Apprendi* recognized that *McMillan* could not coexist with *Apprendi*, because a "range" has both a top and a bottom. *Id.* at 582-83 (quoting *Apprendi*, 530 U.S. at 533 (O'Connor, J., dissenting) (calling on the Court to "admit that it is overruling *McMillan*" by holding that "any fact that increases or alters the range of penalties to which a defendant is exposed—which, by definition, must include increases or alterations to either the minimum or maximum penalties—must be proved to a jury beyond a reasonable doubt"), and *Jones*, 526 U.S. at 268 (Kennedy, J., dissenting) (noting that the rule as expressed by Justice Scalia in his concurrence "would call into question the validity of judge-administered mandatory minimum sentencing provisions, contrary to our holding in *McMillan*")). And several

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Even so, *stare decisis* may be a sufficient reason for the Court to retain a prior decision when "[a]ny anomaly" created by competing opinions "is not critical." *John R. Sand & Gravel Co.*, 552 U.S. at 139. But the anomaly created by *McMillan* and *Harris* is critical. It represents a major inconsistency in this Court's jurisprudence regarding a matter of indisputable significance: a criminal defendant's fundamental rights to notice and jury trial under the Fifth and Sixth Amendments.

That inconsistency has not gone unnoticed by the lower courts. *See, e.g.*, *United States v. Krieger*, 628 F.3d 857, 867-69 (7th Cir. 2010) (noting that "[t]he thread by which *McMillan* hangs may be precariously thin" and that "it is difficult to reconcile *McMillan* with *Apprendi*"), *cert. denied*, 132 S. Ct. 139 (2011); *United States v. Tidwell*, 521 F.3d 236, 251 & n.11 (3d Cir. 2008) (noting that "distinguishing *Apprendi* from *McMillan* and *Harris*" is a "difficult task"); *United States v. Grier*, 475 F.3d 556, 575 (3d Cir. 2007) (Ambro, J., concurring) ("To create a sentencing process that fully carries through on the promise of *Apprendi* and *Blakely*, I believe the Supreme Court would have to overrule, at least, *McMillan* and

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Justices have since noted that *Harris* remains an incompatible outlier in the Court's Sixth Amendment decisions. *See O'Brien*, 130 S. Ct. at 2182, 2183 (Stevens, J., concurring) (arguing that "*McMillan* [was] wrong the day it was decided" and quoting Justice Breyer's comment at oral argument that "at some point I guess I have to accept *Apprendi*, because it's the law and has been for some time"); *id.* at 2183 (Thomas, J., concurring).

Harris.") (citations omitted); *United States v. Dare*, 425 F.3d 634, 641 (9th Cir. 2005) ("We agree that *Harris* is difficult to reconcile with the Supreme Court's recent Sixth Amendment jurisprudence . . . ."); *United States v. Gonzalez*, 420 F.3d 111, 126 (2d Cir. 2005) ("The logic of the distinction drawn in *Harris* between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped."). Thus, overruling *Harris* would not upset the lower courts' understanding of the Court's Sixth Amendment jurisprudence.

Moreover, not only is *Harris* a constitutional case, and thus one in which the force of *stare decisis* is diminished, it is a constitutional case representing only a plurality of the Court. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 63-66 (1996) (rejecting *stare decisis* because the underlying decision interpreted the Constitution and "a majority of the Court expressly disagreed with the rationale of the plurality"). *McMillan* was "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings" of the decision. *See Payne*, 501 U.S. at 828-29. The question in *Harris* was whether *McMillan* survived *Apprendi*. Only four Justices thought that it did, while five did not, finding that *Apprendi* dictated the opposite result. *Stare decisis* thus provides no compelling reason in this situation for allowing the inconsistency in this line of the Court's Sixth Amendment jurisprudence to stand any longer.

Finally, there are no practical impediments to overruling *Harris*. Mandatory minimum charges typically involve only one additional fact. Unlike charging and proving guideline facts to a jury, *cf. United States v. Booker*, 543 U.S. 220, 254-55 (2005), the addition of a single fact is not complicated or unduly burdensome on the government.[9] As this case itself demonstrates, the government can charge the fact upon which the minimum is raised in the indictment and prove it to the jury or enter into plea negotiations regarding it. The government conceded as much in *Harris*. *See* 536 U.S. at 581 (Thomas, J., dissenting) (quoting oral argument transcript). Thus, the government cannot claim to have detrimentally relied on that decision. *See John R. Sand & Gravel Co.*, 552 U.S. at 139; *Lawrence*, 539 U.S. at 577. Further, some states now require notice and proof to a jury beyond a reasonable doubt before a mandatory minimum for a firearm can be imposed. *See State v. Barker*, 705 N.W.2d 768, 771-73 (Minn. 2005); Mont. Code Ann. §46-18-221 (2011); Ohio Rev. Code Ann. §2929.14(B)(1)(a) (West 2012); *see also* Fla. Stat. Ann. §921-142(6)(d) (West 2012) (setting forth firearm use as statutory aggravator for capital drug trafficking offenses). And in several federal circuits, the government already charges drug type and quantity in an indictment and

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[9] Counsel for Mr. Alleyne understand that the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders, as *amici curiae*, intend to file a brief in support of Mr. Alleyne that will, *inter alia*, discuss this point in more detail.

submits those facts to a jury or negotiates for an admission. *See, e.g.*, *United States v. Gonzalez*, 420 F.3d 111, 133-34 (2d Cir. 2005); *United States v. Velasco-Heredia*, 319 F.3d 1080, 1085-87 (9th Cir. 2003).[10]

Stare decisis creates no barrier to overruling *Harris*. The Court should do so now.

II. ALTERNATIVELY, THIS COURT SHOULD CONSTRUE THE BRANDISHING PROVISION AS SETTING FORTH EITHER A FIXED-TERM PUNISHMENT OR A SEPARATE AGGRAVATED OFFENSE.

The rulings in *McMillan* and *Harris* that the facts that set or increase a mandatory minimum sentence need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt were wrong. Those opinions were in conflict with long-established constitutional principles and should, for the reasons set out above, be overruled.

Alternatively, this Court should construe §924(c)(1)(A) as setting forth either a series of fixed-term punishments for specified acts or a series of separate, aggravated offenses. The Court may consider both

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[10] Counsel for Mr. Alleyne understand that the Sentencing Project and the American Civil Liberties Union will file a brief *amicus curiae* further addressing circuit court authority on this issue, as well as the widespread practice of charging and proving drug type and quantity to a jury regardless of circuit law.

interpretations, for "granting certiorari to determine whether a statute is constitutional fairly includes the question of what that statute says." *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 56 (2006). If either of these interpretations is correct, Mr. Alleyne's sentence cannot stand, because it was imposed in violation of his Sixth Amendment right to a jury determination of the fact triggering the fixed term or establishing the aggravated offense.

A. This Court Should Read §924(c)(1)(A) To Set Forth Fixed Terms Of Imprisonment Rather Than Mandatory Minimum Terms With An Implied Life Maximum.[11]

Section 924(c)(1) makes it a crime to use or carry a firearm during and in relation to a crime of violence. The statute provides that a defendant convicted of this offense shall "(i) be sentenced to a term of imprisonment of not less than 5 years; (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years" or "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." 18 U.S.C. §924(c)(1)(A). The courts of appeals that have addressed the issue have either held or assumed that §924(c)(1)(A) provides for a maximum sentence of life

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[11] Counsel for Mr. Alleyne understand that the brief filed by the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders, *see supra* note 9, will also address this point in more detail.

imprisonment. *See United States v. Lucas*, 670 F.3d 784, 795-96 (7th Cir. 2012) (collecting cases from seven other circuits). This Court appears to have made the same assumption in *Harris*, although the Court has never expressly so held. *See* 536 U.S. at 554; *id.* at 574 (Thomas, J., dissenting).[12]

The statute never specifies a life sentence maximum. The only sentences specified are the "not-less-than" five-, seven-, and ten-year terms for using and carrying, brandishing, and discharging a firearm, respectively. 18 U.S.C. §924(c)(1)(A); *see also* Tr. of Oral Arg. at 13-16, *O'Brien v. United States*, 130 S. Ct. 2169 (2010) (No. 08-1569) (questioning by Justices Scalia, Ginsburg, and Sotomayor regarding the absence of any reference to a life sentence maximum in the statute). This stands in contrast to statutes in which Congress has created sentencing ranges of "not less than" a specified term of years "or for life." *See, e.g.*, 18 U.S.C. §33(b); 18 U.S.C. §175c; 18 U.S.C. §225; 18 U.S.C. §1591(b); 18 U.S.C. §2251A; 21 U.S.C. §848(a).

The best reading of §924(c) is therefore that it establishes fixed-term sentences. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) (noting presumption that

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[12] The petitioner in *Harris* stated in his brief that the maximum was life imprisonment, but neither cited any support for that statement nor saw fit to challenge the premise. *See* Br. for Petitioner 29, *Harris v. United States*, 536 U.S. 545 (2002) (No. 00-10666).

Congress will express its intent in statutory text); *Whitfield v. United States*, 543 U.S. 209, 216 (2005) ("Congress has included an express overt act requirement in at least 22 other current conspiracy statutes, clearly demonstrating that it knows how to impose such a requirement when it wishes to do so."). To find otherwise requires this Court to infer something that Congress did not make clear. But "mere implication can hardly ever be a safe ground on which to rest a penalty" because the "[p]ower to inflict a particular penalty must be conferred by congress in such terms as will bear a strict construction." *Stimpson v. Pond*, 23 F. Cas. 101, 102 (C.C. Mass. 1855) (Curtis, J.) (finding that statute providing for "a penalty of not less than one hundred dollars" does not "authorize the infliction of a penalty greater than one hundred dollars"); *Simpson v. United States*, 435 U.S. 6, 15 (1978) (finding that construction of version of §924(c) then in effect to authorize punishment in addition to enhanced punishment in statute for underlying offense would violate rule of lenity). Mere implication would also violate fair notice principles. *See, e.g.*, *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (stating that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes"); *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (observing that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed").

As the government acknowledges, reading the §924(c)(1)(A) penalties as fixed terms would render Mr. Alleyne's sentence infirm under *Apprendi*. *See* Br. for the United States in Opposition 10 n.2, *Lucas v. United States* (No. 11-1536, filed Oct. 17, 2012) (acknowledging that if §924(c)(1)(A)(i), (ii) and (iii) state fixed-term sentences, such sentences "would reflect varying statutory maximum sentences and would plainly be subject to *Apprendi* – resolving the *Alleyne* petitioner's claim that his brandishing should have been proven to a jury beyond a reasonable doubt"). Accordingly, if §924(c)(1)(A) sets forth fixed terms, Mr. Alleyne's sentence must be reversed.

B. This Court's Test For Whether A Fact Is An Element Or A Sentencing Factor Demonstrates That Brandishing Is An Element.

This Court has twice considered whether the "machinegun" provision of §924(c) sets out an element or a sentencing factor. In determining that the type of weapon is an element, the Court used a five-factor test that looked to "(1) language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history." *O'Brien*, 130 S. Ct. at 2175; *see Castillo v. United States*, 530 U.S. 120, 124-31 (2000). As with weapon type, these five factors show that brandishing is an element of a §924(c)(1)(A) offense and must be found by the jury beyond a reasonable doubt.

The text and structure of the statute, and its content, suggest that it establishes a series of separate, escalating offenses, each marked by the addition of an elemental act that marks the crime as more serious. The structure of the statute shows that brandishing a firearm makes an offense more serious than merely using and carrying a firearm, and discharging a firearm makes an offense that is more serious still. *See O'Brien*, 130 S. Ct. at 2179-80 (type of gun element creates aggravated offense); *Jones*, 526 U.S. at 233, 252 (type of injury creates aggravated offense). Further, in defining "brandish," Congress included both an *actus reus* and a *mens rea*—the two essential portions of a criminal offense. *See* 18 U.S.C. §924(c)(4) (providing that "the term 'brandish' means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person"). Thus, the first *Castillo/ O'Brien* factor weighs in favor of reading §924(c)(1)(A) as creating separate offenses.

So, too, does the tradition of treating brandishing and discharge of a firearm as crimes that are separately chargeable and punishable. Many state criminal codes have treated these acts as independent crimes. *See, e.g.*, Va. Code Ann. §18.2-282(A) (West 2012) ("It shall be unlawful for any person to point, hold or brandish any firearm . . . , in such manner as to reasonably induce fear in the mind of another of being shot or injured."); Idaho Code Ann. §18-3304

(West 2012); Ind. Code Ann. §35-47-4-3(b) (West 2012); Mich. Comp. Laws Ann. §750.234e(1) (2012); Minn. Stat. Ann. §609.66, subd. 1(a)(2) (intentional pointing) & subd. 1a(a)(2), (3) (intentional or reckless discharge) (West 2012); N.Y. Penal Law §265.35(3) (McKinney 2012); S.C. Code Ann. §16-23-420(B) (2011); Vt. Stat. Ann. tit. 13, §4011 (West 2012); Wis. Stat. Ann. §941.20(1)(c) (West 2012). These examples demonstrate a further basis for treating brandishing as offense conduct, not as a sentencing factor. *See O'Brien*, 130 S. Ct. at 2176 (noting that "firearm type is treated as an element in a number of statutes").

Following the states' lead by recognizing that the act of brandishing or discharging a gun constitutes a separate offense also avoids the unfairness that occurs when—as happened here—"a judge's later, sentencing-related decision" that a gun was brandished "conflict[s] with the jury's belief" that it was not. *Castillo*, 530 U.S. at 128. And the government cannot claim any unfairness if brandishing is treated as an element, as it charged brandishing in the indictment and attempted, but failed, to prove it to the jury. *See O'Brien*, 130 S. Ct. at 2177 (noting that "the Government does not suggest that it would be subjected to any unfairness if the machinegun provision continues to be treated as an element"); *Harris*, 536 U.S. at 581 (Thomas, J., dissenting) (noting the government's concession "that it can charge facts upon which a mandatory minimum sentence is based in the indictment and prove them to a jury"). Thus,

the unfairness factor weighs heavily in favor of reading brandishing as an element.

Such a reading also accounts more appropriately for the severity of the sentence. The seven-year sentence for brandishing is 40% longer than a five-year sentence for use or carrying, and the ten-year sentence under the discharge provision is 100% longer—a not-insignificant difference to an incarcerated person. *See, e.g.*, *Glover v. United States*, 531 U.S. 198, 203 (2000) (noting, in the context of an increase in prison time of as little as six months, "our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance"). Offenses that are more serious and more culpable should be punished more severely, as brandishing is under §924(c).

Finally, the legislative history of §924(c)(1)(A) gives no indication that Congress thought "use" of a firearm would be an element, but brandishing and discharge would be mere sentencing factors. To the contrary, the history suggests that Congress believed brandishing to be an element. *See* H.R. Rep. No. 105-344, at 12 (1997) ("To sustain a *conviction* for brandishing or discharging a firearm, the government must demonstrate that the firearm was used 'during and in relation to' the commission of the federal crime of violence or drug trafficking crime.") (emphasis added); *id.* ("defin[ing] the term 'brandish' for purposes of a §924(c) *charge*") (emphasis added); *id.* at 13 (noting evidentiary issues relating to prosecutors "bringing a *charge* for brandishing a firearm under

§924(c)") (emphasis added). Indeed, as noted above, Congress defined "brandish" in traditional offense terms, by including both an act and a mental state.

The *Harris* Court incorrectly read §924(c) to provide that brandishing is a sentencing factor, not an element. *O'Brien* noted this reading in dicta. 130 S. Ct. at 2173. *Jones* and *O'Brien*, however, construed statutory provisions similar to the one at issue here and found that the relevant facts were elements. Although *stare decisis* has more force in statutory interpretation cases, *see John R. Sand & Gravel Co.*, 552 U.S. at 139, the actual holdings of *Jones* and *O'Brien* undermine the reasoning of the *Harris* plurality. The Court thus should not rely on *stare decisis* here, where the alternative construction can be used to avoid a serious constitutional question.

In short, because brandishing is one of a series of offenses established in §924(c), the district court was bound by the jury's verdict in sentencing Mr. Alleyne. His sentence must be reversed.

CONCLUSION

For the above-stated reasons, the Court should reverse the decision of the Fourth Circuit with instructions to reverse the judgment of the district court.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

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18 U.S.C. § 924(c)

(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm

muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

RESPONDENT'S BRIEF

No. 11-9335

In the Supreme Court of the United States

ALLEN RYAN ALLEYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Court should overrule its decision in *Harris* v. *United States*, 536 U.S. 545 (2002).

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In the Supreme Court of the United States

No. 11-9335

ALLEN RYAN ALLEYNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 73-78) is not published in the Federal Reporter but is available at 2011 WL 6228319.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 2011. The petition for a writ of certiorari was filed on March 14, 2012, and was granted on October 5, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of robbery affecting interstate commerce, in violation of 18 U.S.C. 1951(a) and 2, and using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c) and 2. J.A. 64. He was sentenced to a total of 130 months of imprisonment including a mandatory minimum term of 84 months under Section 924(c)(1)(A)(ii), based on the district court's finding that he was liable for his accomplice's brandishing of a firearm, to be followed by five years of supervised release. J.A. 65-66. The court of appeals affirmed. J.A. 73-78.

1. In August 2009, petitioner's girlfriend, who worked at a convenience store, suggested a plan to rob the store's manager as he drove the daily deposits to a local bank. Presentence Investigation Report (PSR) ¶¶ 5-6. She provided petitioner with extensive information about the store's operations, and petitioner and an accomplice (who was not identified at trial) conducted surveillance on the store. *Ibid.* On September 30, 2009, petitioner and his girlfriend rented a car for use in the robbery. PSR ¶ 7.

The following day, petitioner and the accomplice waited for the manager to leave the store with the day's deposits and then positioned their rental car on the side of the road ahead of him. PSR ¶ 9. As the manager approached, petitioner's accomplice got out of the rental car and made it appear as though he and petitioner were experiencing car trouble. *Ibid.* He then walked towards the manager's minivan and gestured for the manager to roll down his window. *Ibid.* When he reached the minivan, petitioner's accomplice pulled out a gun, pushed it

up against the manager's neck, and demanded the bag containing the bank deposits. *Ibid.* The manager complied, handing over a total of $13,201.99. PSR ¶¶ 9-10. Petitioner then sped away in the rental car with the accomplice in the passenger seat. PSR ¶ 9.

2. A grand jury in the Eastern District of Virginia indicted petitioner on one count of robbery affecting interstate commerce, in violation of 18 U.S.C. 1951(a) and 2, and one count of "us[ing], carry[ing], brandish-[ing], and possess[ing]" a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c)(1) and 2. J.A. 14-15. The jury, which was instructed that it could find petitioner guilty either for personally committing the charged violations or for aiding and abetting them, found petitioner guilty on both counts. J.A. 24-26, 34-37, 40.

The verdict form asked the jury, if it found petitioner guilty on the Section 924(c)(1) count, to determine whether he "[u]sed or carried a firearm during and in relation to a crime of violence," "[p]ossessed a firearm in furtherance of a crime of violence," or "[b]randished a firearm in connection with the crime of violence." J.A. 40. In response to questions from the jury during deliberations, the court instructed the jury that it had to find "at least one" of those options in order to find petitioner guilty on that count, but that it did not have to check "all three," so long as the jurors were unanimous about whatever they selected. J.A. 38-39. The jury selected the first option ("[u]sed or carried a firearm during and in relation to a crime of violence") without indicating any further findings on the other options. J.A. 40.

3. The presentence investigation report calculated an advisory Sentencing Guidelines range of 46 to 57 months of imprisonment on the robbery count. PSR ¶ 80. It

further recommended that the statutory penalty for the Section 924(c)(1) offense was "a mandatory minimum of 7 years to Life, consecutive," PSR Addendum 1, reflecting the minimum penalty for cases in which the defendant brandishes (or aids and abets the brandishing of) a firearm, see 18 U.S.C. 924(c)(1)(A)(ii).

Petitioner objected to the seven-year mandatory minimum, contending that the court lacked constitutional authority to find brandishing and that, in any event, the evidence did not support such a finding. 3:10-cr-134-REP Docket entry No. 7, at 2 n.1 (Jan. 7, 2011) (Pet. PSR Objection); J.A. 43-47. Petitioner acknowledged that the legal argument against the court's power to make a finding on brandishing was foreclosed by this Court's decision in *Harris* v. *United States*, 536 U.S. 545 (2002), which held that brandishing under Section 924(c)(1)(A)(ii) is a sentencing factor for the court to determine and that judicial factfinding that raises the mandatory minimum penalty for a Section 924(c)(1)(A) violation is constitutional. Pet. PSR Objection 2 n.1; J.A. 43-44.

The district court concluded that "the decision in *Harris* combined with the evidence in this case calls for the overruling of the objection." J.A. 61. It reasoned that "brandishing is a sentencing factor * * * to be determined by the preponderance of the evidence"; that the "preponderance of the evidence here would support a finding that the defendant aided and abetted the brandishing that actually, undeniably, and undisputedly occurred"; and that "[a]lthough the jury did not find beyond a reasonable doubt that the defendant reasonably foresaw his coconspirator brandishing a firearm for the express purpose of intimidation, the Court is not precluded from finding by the lower preponderance of

the evidence [standard] that he did." J.A. 61-62. The court sentenced petitioner to a 46-month term of imprisonment on the robbery count and a consecutive 84-month (seven-year) term of imprisonment on the Section 924(c)(1) count. J.A. 63, 65.

4. The court of appeals affirmed in an unpublished, per curiam opinion. J.A. 73-78. The court held, as petitioner again conceded, that *Harris* foreclosed a constitutional challenge to the mandatory minimum sentence on the Section 924(c)(1) count. J.A. 78.

SUMMARY OF ARGUMENT

This Court has twice upheld a legislature's constitutional authority to guide a judge's otherwise-discretionary sentencing determination by providing for a specific increase in a minimum sentence, within the otherwise-authorized range, upon the finding of a specified fact. See *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986); *Harris* v. *United States*, 536 U.S. 545 (2002). *Harris* involved a Section 924(c)(1)(A)(ii) sentence essentially identical to petitioner's. The Court should reaffirm *Harris*.

I. Mandatory minimum sentencing statutes represent a twentieth-century innovation designed to promote consistency in sentencing and establish legislative restraints on judicial discretion. In *McMillan*, this Court held that permitting a legislature to dictate the precise weight of a sentencing factor within a range that the judge already had available by virtue of the jury verdict did not infringe constitutional protections. After the Court held in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), that, other than a prior conviction, any fact that results in a sentence above the otherwise-authorized maximum term is subject to the jury-trial and reasonable-doubt guarantees, the Court revisited *McMillan*.

Although members of the majority relied on different rationales, *Harris* reaffirmed that mandatory minimum sentencing statutes that rely on judicial factfinding do not infringe the *Apprendi* rule. And it did so in upholding an increased mandatory minimum sentence under Section 924(c)(1)(A). As the plurality explained, *Apprendi* prevents a judge from increasing his zone of discretion by finding a fact that enlarges the sentencing range. But that rationale does not apply when a legislature specifies that a particular fact restricts judicial discretion by removing authority to impose a lower sentence *within* the range. The protection of *Apprendi* remains intact, since the sentence cannot exceed the maximum based on the facts found by the jury.

II. Petitioner, having sought certiorari on the theory that *Harris*'s constitutional holding should be overruled (Pet. 7-14), now advances (for the first time in this case) statutory-construction arguments that Section 924(c)(1)(A) does not, in fact, establish mandatory minimum sentencing factors for the judge to consider. Those claims are forfeited, inconsistent with the Court's statutory holding in *Harris*, and unsound.

Petitioner first argues that Congress intended to treat brandishing and discharging as elements that must be proved to the jury, rather than as judicially determined sentencing factors. That argument was raised and rejected in *Harris*. The Court's holding in *Harris* is entitled to the added force that *stare decisis* has in statutory cases, and petitioner offers nothing that would carry his considerable burden. Petitioner's alternative argument—that Section 924(c)(1)(A) should be interpreted as setting forth fixed-term sentences, rather than mandatory minimums—is also inconsistent with *Harris*, as well as with other decisions of this Court that discuss

Section 924(c)(1)(A)'s operation. In any event, petitioner offers no sound reason to interpret the phrase "not less than [five, seven, or ten] years," 18 U.S.C. 924(c)(1)(A)(i)-(iii), to mean "not less than *and not more than* [five, seven, or ten] years."

III. The Court should adhere to *Harris*'s constitutional holding. Judicial factfinding in a discretionary system, this Court has recognized, is consistent with *Apprendi* and the right to a jury trial. Judges therefore may find facts, and may calibrate the sentence based on those findings, when the judge determines that those facts are relevant to selecting a sentence within the range authorized by the jury verdict. Such judicial factfinding raises no constitutional concern because the facts found by the jury authorize the sentence imposed. The same is true when a legislature determines that, to ensure consistency and appropriate punishment, one fact that a judge must find shall be given a consistent minimum weight by all judges in sentencing similarly situated offenders. Once the jury verdict authorizes a particular maximum sentence, the finding of a fact—here, for example, brandishing—that raises the minimum sentence within the authorized range poses no threat to the jury's power.

Petitioner's contention that the Constitution precludes such sentencing provisions rests primarily on this Court's decision in *Apprendi*. But as the Court has repeatedly recognized, the holding of *Apprendi* is that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." 536 U.S. at 490 (emphasis added). Nothing in *Apprendi* dictates that juries must also find facts that trigger an increase

in a mandatory minimum. And statutes like Section 924(c)(1)(A) do not raise *Apprendi*'s concern: that allowing judge-found facts to raise the maximum *increases* the judge's sentencing authority at the expense of the jury. To the contrary, such statutes *decrease* judicial sentencing authority upon the finding of a specified fact.

Petitioner espouses a broader reading of *Apprendi's* principle, applying it to "facts that increase the range of punishment to which a criminal defendant is exposed." Pet. Br. 9. That formulation not only expands *Apprendi*, but is difficult to reconcile with this Court's decision in *Oregon* v. *Ice*, 555 U.S. 160 (2009), which upheld a legislature's conditioning of consecutive sentences based on judge-found facts. Its adoption here would also threaten legislative reliance on affirmative defenses and sentencing mitigation factors. The Court found ample historical support for the result it reached in *Apprendi* (and in later cases that likewise involved increased maximum sentences). Petitioner and his amici, however, identify no historical precedent in sentencing law for the novel rule they seek in this case.

Finally, regardless of whether this Court would agree with *McMillan* and *Harris* as an original matter, *stare decisis* counsels strongly against overruling them. Congress and state legislatures enacted numerous mandatory minimum sentencing schemes (including Section 924(c)(1)(A) itself) in the wake of *McMillan*, and they have enacted still more since *Harris*. And overturning *McMillan* and *Harris* could provoke unpredictable legislative responses with potentially adverse consequences for defendants, prosecutors, and courts.

ARGUMENT

For more than two and one-half decades, this Court has upheld the authority of a legislature to constrain

judicial discretion at sentencing by providing that a court's specific findings of fact may require an increase in a minimum sentence within the otherwise-authorized range. See *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). Section 924(c)(1)(A) comports with this tradition by making the fact of brandishing a firearm a basis for increasing the mandatory minimum sentence for a Section 924(c)(1)(A) violation from five years to seven years—with the maximum sentence remaining at all times life imprisonment.

In *Harris* v. *United States*, 536 U.S. 545 (2002), the Court held that Section 924(c)(1)(A)(ii) validly constrained the sentencing court's discretion. It should adhere to that decision notwithstanding the Court's pre-*Harris* decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). *Apprendi* reined in legislative schemes in which a judicial finding of fact *extended* the judge's discretion by authorizing a longer maximum sentence. *Harris* sustained a scheme in which the legislature specifies the sentencing consequences of a particular judicial fact-finding *within* the authorized range. *Harris*'s reaffirmation of *McMillan* was sound, and the Court should adhere to it today.

I. THIS COURT HAS ENDORSED LEGISLATIVE AUTHORITY TO REQUIRE INCREASES IN A MINIMUM SENTENCE WITHIN AN AUTHORIZED RANGE BASED ON JUDICIAL FACTUAL FINDINGS

This Court's analysis of the role of mandatory minimum sentences responds to the background principle that the primary responsibility for establishing sentencing practices and policies resides with the legislature, so long as the sentences stay within constitutional bounds. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("Congress has the power to define criminal punish-

ments without giving the courts any sentencing discretion."). As this Court has held, Section 924(c)(1)(A)(ii) fits comfortably within the legislature's authority to channel judicial discretion in sentencing.

Early in the Nation's history, legislatures generally specified fixed or mandatory sentences that supplied a determinate and precise punishment for each particular offense. See, *e.g.*, *United States* v. *Grayson*, 438 U.S. 41, 45 (1978). Over time, however, Congress and various state legislatures largely "abandoned fixed-sentence rigidity * * * and put in place a system of ranges within which the sentencer could choose the precise punishment." *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989); see *Grayson*, 438 U.S. at 45. Under that system, a judge deciding on a sentence could "appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972); see *Williams* v. *New York*, 337 U.S. 241, 246 (1949) (discussing the "historical latitude allowed sentencing judges").

In the twentieth century "the pendulum * * * swung back," *Payne* v. *Tennessee*, 501 U.S. 808, 820 (1991), as legislatures explored mechanisms to regain control over judicial discretion in sentencing. One mechanism for achieving that legislative purpose came under review in *McMillan*. In that case, Pennsylvania had provided that a person convicted of a specified felony was subject to a mandatory minimum penalty of five years of imprisonment if the sentencing judge found, by a preponderance of the evidence, that the person visibly possessed a firearm while committing the offense. *McMillan*, 477 U.S. at 80-94. The Court held that neither due process nor the Sixth Amendment required the

State to treat visible possession as an element of the offense or to prove its existence beyond a reasonable doubt to a jury. *Id.* at 84-93. The Court observed that the sentencing provision "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding." *Id.* at 87-88.

Eleven years after *McMillan*, Congress enacted the current version of 18 U.S.C. 924(c). Act of Nov. 13, 1998, Pub. L. No. 105–386, § 1(a), 112 Stat. 3469. Section 924(c) is "one of several measures to punish gun possession by persons engaged in crime" and makes it "a discrete offense to use, carry, or possess a deadly weapon in connection with 'any crime of violence or drug trafficking crime.'" *Abbott* v. *United States*, 131 S. Ct. 18, 22 (2010) (quoting 18 U.S.C. 924(c)(1)). As relevant here, Section 924(c)(1)(A) provides that anyone who violates that prohibition "shall, in addition to the punishment provided for such crime of violence or drug trafficking crime," "(i) be sentenced to a term of imprisonment of not less than five years"; "(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years"; and "(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years." 18 U.S.C. 924(c)(1)(A).

In *Harris*, this Court "[r]eaffirm[ed] *McMillan*" in the context of a prosecution under Section 924(c)(1)(A). 536 U.S. at 568. The district court in *Harris* found by a preponderance of the evidence that the defendant brandished a firearm during a drug-trafficking offense and relied on that finding to impose a seven-year mandatory minimum sentence under Section 924(c)(1)(A)(ii). *Id.* at

551. This Court upheld the sentence. *Id.* at 551, 569. The Court first concluded, as a statutory matter, that Section 924(c)(1)(A) "regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." *Id.* at 556. It reasoned, among other things, that *McMillan* would have led Congress to believe that a statute structured in that fashion was constitutional. *Ibid.*

The Court additionally concluded, as a constitutional matter, that it would adhere to *McMillan*, notwithstanding the petitioner's argument that *McMillan* had been superseded by *Apprendi*. *Harris*, 536 U.S. at 568; see Pet. Br. 40, *Harris*, *supra* (No. 00-10666) (*Harris* Pet. Br.). No single rationale for rejecting that argument commanded a majority of the Justices. Four members of the Court concluded that mandatory minimums did not implicate the rationale or historical basis of *Apprendi*. *Harris*, 536 U.S. at 556-568 (plurality opinion of Kennedy, J.). Justice Breyer concurred in part and concurred in the judgment, finding it difficult to distinguish *Apprendi* "in terms of logic," but maintaining his disagreement with *Apprendi* and joining the Court's opinion "to the extent that it holds that *Apprendi* does not apply to mandatory minimums." *Id.* at 569-572 (Breyer, J., concurring in part and concurring in the judgment). Accordingly, the opinion of the Court concluded that, "employing the approach outlined in" *McMillan*, "[b]asing a 2-year increase in the defendant's minimum sentence on a judicial finding of brandishing does not evade the requirements of the Fifth and Sixth Amendments." *Id.* at 568. The Court explained that by increasing the minimum sentence on that basis, "Congress 'simply took one fact that has always been considered by sentencing courts to bear on punishment and

dictated the precise weight to be given that factor.'" *Id.* at 568 (quoting *McMillan*, 477 U.S. at 89-90) (alteration omitted). That sentencing factor, the Court held, "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." *Ibid.*

Harris's statutory and constitutional holdings should be reaffirmed today. As was true then (and was equally true years earlier in *McMillan*), legislatures can regulate sentencing, within the otherwise-authorized range, by providing for judicial factfinding to raise a minimum sentence. Such a provision restricts judicial discretion but does not redefine the offense or empower the court to impose a sentence that it otherwise lacked authority to impose. As a means of channeling judicial discretion within the authorized range (of five years to life imprisonment), Section 924(c)(1)(A)(ii) is constitutionally sound.

II. THE COURT SHOULD REAFFIRM *HARRIS*'S HOLDING THAT SECTION 924(c)(1)(A) DEFINES A SINGLE FEDERAL CRIME WITH THREE SENTENCING PROVISIONS AND A MAXIMUM TERM OF LIFE IMPRISONMENT

In the courts below, petitioner objected to the imposition of a seven-year mandatory minimum sentence only on factual and constitutional grounds. See Pet. PSR Objection 2 n.1; J.A. 43-47; Pet. C.A. Br. 31-35. And when he filed his petition for a writ of certiorari, he raised only one argument: that *Harris*'s constitutional holding was incorrect and should be overruled. See Pet. 7-14. This Court granted certiorari based on that question presented and specified no other issue. J.A. 80. At the tail end of his merits brief, however, petitioner for the first time challenges his sentence on statutory grounds. See Pet. Br. 43-51. This Court typically does

not consider issues that were neither pressed nor passed on in the lower courts. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992); *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). And even if the Court were to consider petitioner's statutory arguments, both are foreclosed by *Harris*; principles of statutory *stare decisis* counsel strongly against revisiting *Harris*'s interpretation of Section 924(c)(1)(A); and petitioner identifies no error in *Harris*'s conclusions.

A. *Harris* Held That Section 924(c)(1)(A)'s Brandishing And Discharging Provisions Are Sentencing Factors, Not Offense Elements

This Court concluded in *Harris* that, "as a matter of statutory interpretation, § 924(c)(1)(A) defines a single offense" that "regards brandishing and discharging as sentencing factors to be found by the judge, not offense elements to be found by the jury." 536 U.S. at 556. The Court observed that the statute "begins with a lengthy principal paragraph listing the elements of a complete crime—the basic federal offense of using or carrying a gun during and in relation to a violent crime or drug offense"; that "[t]oward the end of the paragraph is the word 'shall,' which often divides offense-defining provisions from those that specify sentences"; and that "following 'shall' are the separate subsections, which explain how defendants are to 'be sentenced'" by setting forth graduated minimum penalties. *Id.* at 552 (internal quotation marks and citations omitted). "When a statute has this structure," the Court explained, "we can presume that its principal paragraph defines a single crime and its subsections identify sentencing factors." *Id.* at 553.

The Court also found that "critical textual clues * * * reinforce the single-offense interpretation implied by the statute's structure." *Harris*, 536 U.S. at 553. The Court noted that its decision in *Castillo* v. *United States*, 530 U.S. 120 (2000), had "singled out brandishing as a paradigmatic sentencing factor" and that sentencing enhancements in the federal Sentencing Guidelines "appear to have been the only antecedents for the statute's brandishing provision." *Harris*, 536 U.S. at 553-554; see *Castillo*, 530 U.S. at 126. The Court also noted that the brandishing and discharging provisions did not create "'steeply higher penalties'" that might cast doubt on Congress's intent to make those penalties "contingent on judicial factfinding." *Harris*, 536 U.S. at 554 (quoting *Jones* v. *United States*, 526 U.S. 227, 233 (1999)). Rather, the statute's "incremental changes in the minimum—from 5 years, to 7, to 10—are precisely what one would expect to see in provisions meant to identify matters for the sentencing judge's consideration." *Ibid.*

Finally, the Court rejected the argument that the canon of constitutional avoidance favored an interpretation of Section 924(c)(1)(A) that would treat brandishing and discharging as elements. *Harris*, 536 U.S. at 555. The Court observed that the "avoidance canon rests upon our 'respect for Congress, which we assume legislates in the light of constitutional limitations.'" *Id.* at 556 (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991)). And because Section 924(c)(1)(A) "was passed when *McMillan* provided the controlling [constitutional] instruction"—namely, that legislatures *could* authorize judges to find facts that increase mandatory minimums—"Congress would have had no reason to believe

that it was approaching the constitutional line by following that instruction." *Ibid.*

B. Petitioner Provides No Reason To Reconsider *Harris*'s Statutory Holding

1. The version of Section 924(c)(1)(A) before the Court in this case is the same version analyzed in *Harris*. Compare *Harris*, 536 U.S. at 550-551, with App., *infra*, 1a-2a. The meaning of the statutory language has not changed, and revising *Harris*'s interpretation of it "would ill serve the goals of 'stability' and 'predictability' that the doctrine of statutory *stare decisis* aims to ensure." *CSX Transp. Inc.* v. *McBride*, 131 S. Ct. 2630, 2641 (2011) (quoting *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991)). As petitioner acknowledges (Pet. Br. 51), "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what [the Court has] done.'" *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)); see, *e.g.*, *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1841 (2012). This Court should respect Congress's choice not to amend Section 924(c)(1)(A) following *Harris*.

In support of his contention (Pet. Br. 47-51) that *Harris* misinterpreted Section 924(c)(1)(A), petitioner cites only one post-*Harris* decision, *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010). Far from casting doubt on *Harris*, that decision reiterates that "the brandishing and discharge provisions codified in § 924[(c)(1)](A)(ii) and (iii) do state sentencing factors." *Id.* at 2180; see also *Dean* v. *United States*, 556 U.S. 568, 574 (2009). Indeed, the Court in *O'Brien* supported its holding—that a weapon's status as a machinegun under Section

924(c)(1)(B)(ii) is an element of an offense, rather than a sentencing factor—in part by highlighting a structural difference between that provision and the provisions at issue in *Harris*. 130 S. Ct. at 2180. The Court noted that if Congress had intended "firearm type as a sentencing factor, it likely would have listed firearm types" in subsections adjacent to the brandishing and discharge provisions; instead, it "set [them] apart from the sentencing factors in (A)(ii) and (iii)." *Ibid.* *O'Brien* thus reaffirmed the sentencing-factor interpretation of Section 924(c)(1)(A)(ii) on which Congress had every reason to rely.

2. Petitioner cannot carry his "considerable burden" to overcome this settled interpretation. *CBOCS West, Inc.* v. *Humphries*, 553 U.S. 442, 451 (2008). Indeed, he fails to identify any error in *Harris*'s analysis. Contrary to petitioner's suggestion, the five factors this Court has relied on to distinguish sentencing factors from elements—"(1) language and structure, (2) tradition, (3) risk of unfairness, (4) severity of the sentence, and (5) legislative history," *O'Brien*, 130 S. Ct. at 2169 (citing *Castillo*, 530 U.S. at 124-131)—demonstrate that brandishing and discharging are sentencing factors.

First, the structural placement of brandishing and discharging in subsections immediately following the base offense signals that they are sentencing factors. *O'Brien*, 130 S. Ct. at 2176; see *Castillo*, 530 U.S. at 124-125; *Jones*, 526 U.S. at 232-233. Petitioner's suggestion (Pet. Br. 48) that brandishing and discharging must be offense elements because they make a defendant's offense "more serious" would eliminate the statutory inquiry into sentencing factors altogether. Petitioner also fails to support his claim (*ibid.*) that sentencing factors typically do not include both an act and a mental state.

To the contrary, this Court has observed that "[t]raditional sentencing factors often involve * * * special features of the manner in which a basic crime was carried out," including features like "abus[ing] a position of trust or brandish[ing] a gun," both of which have both an act and a mental-state component. *Castillo*, 530 U.S. at 126.

Second, brandishing has long been considered a quintessential sentencing factor under federal law. See, *e.g.*, Report of The Twentieth Century Fund Task Force on Criminal Sentencing, *Fair and Certain Punishment* 57 (1976) (Task Force Report) ("brandish[ing] a weapon" is factor affecting the appropriate sentence for the crime of burglary); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 203(e)(2)(E)(ii), 110 Stat. 3009-567 (directing Sentencing Commission to enhance sentence for alien-smuggling on a finding of brandishing); Sentencing Guidelines § 1A1.1 n.3 (using brandishing a gun as an example of a factor relevant to sentencing); *id.* §§ 2A2.2(b)(2)(C), 2B3.2(b)(3)(A)(iii) (enhancements for brandishing); see also *McMillan*, 477 U.S. at 81, 90-91 (declining to hold that "visible possession" of a firearm has historically been treated as an element); cf. Sentencing Guidelines §§ 2A2.2(b)(2)(A), 2B3.2(b)(3)(A)(i), 5K2.6 (enhancements for discharging). Although some state statutes define brandishing or discharging a firearm (in certain circumstances) as a stand-alone offense (Pet. Br. 48-49), those statutes do not inform whether brandishing and discharging are sentencing factors when a firearm facilitates *another* offense. See 18 U.S.C. 924(c)(1)(A). And this Court has recognized that in distinguishing sentencing factors from elements, "state practice is not * * *

direct authority for reading" a federal statute. *Jones*, 526 U.S. at 237.

Third, the only "unfairness" petitioner claims (Pet. Br. 49) in treating brandishing and discharging as sentencing factors is that a judge might make different findings than a jury. But judicial factfinding is an inherent feature of all sentencing factors. Petitioner's assertion that Congress would consider a procedure "unfair" if a judge might differ from a jury implies that no sentencing factors are fair. But this Court has consistently recognized that judicial factfinding to support a sentence within a predetermined range is permissible when the judge determines what facts are relevant, see *United States* v. *Booker*, 543 U.S. 220, 233 (2005), and under such a regime, the judge can find by a preponderance of the evidence the same fact that a jury declined to find. Even "an acquittal in a criminal case"—which reflects the jury's failure to make a particular finding beyond a reasonable doubt—"does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof," such as a sentencing proceeding. *United States* v. *Watts*, 519 U.S. 148, 156 (1997) (per curiam) (quoting *Dowling* v. *United States*, 493 U.S. 342, 349 (1990)).

Fourth, cases in which this Court has found the severity of a sentencing increase to cut in favor of treating a provision as an element have involved much greater increases than the two- and five-year increases at issue here. See *O'Brien*, 130 S. Ct. at 2178 (increase from five-year mandatory minimum to 30-year mandatory minimum for carrying a machinegun); *Castillo*, 530 U.S. at 131 (increase from five-year mandatory sentence to ten-year or 30-year mandatory sentence for carrying

certain firearms); see also *Jones*, 526 U.S. at 230, 233 (increasing statutory maximum from 15 years to 25 years or to life). Petitioner's contention (Pet. Br. 50) that any increase in a defendant's sentence suggests an intent to create an element would effectively eliminate severity as a consideration.

Finally, the legislative history supports treating brandishing and discharging as sentencing factors. The House proposed a bill in which brandishing and discharging would, in fact, have been elements of discrete offenses: the principal paragraph would not itself have defined a full offense and the three subsections would each have described the penalty for specific conduct ("possess[ing]," "brandish[ing]," or "discharg[ing]" a firearm, respectively). H.R. 424, 105th Cong., 2d Sess. (1998). The House Report relied on by petitioner (Pet. Br. 50-51) refers to the House bill, not the statute as enacted. See H.R. Rep. No. 344, 105th Cong., 1st Sess. 2 (1997). The final version of the statute, however, adopted the structure common to a single offense with multiple sentencing factors. See 18 U.S.C. 924(c)(1)(A); see *Harris*, 536 U.S. at 552-553.

C. The Penalties Set Forth In Section 924(c)(1)(A) Are Mandatory Minimums, Not Fixed Terms Of Imprisonment

1. As an alternative to his argument that the brandishing and discharging provisions are elements of discrete offenses, petitioner (along with one of his amici) separately contends that the three subsections of Section 924(c)(1)(A) set forth fixed terms of imprisonment. See Pet. Br. 44-47; Nat'l Ass'n of Crim. Defense Lawyers Amicus Br. 2-28 (NACDL Br.). On that theory, the five-year, seven-year, or ten-year term mentioned in each subsection is not only the minimum sentence, but

also the maximum sentence when the specified conditions are met. If that were the case, having a judge, rather than a jury, make a finding that increased the sentence would violate the rule in *Apprendi* that "any fact (other than prior conviction) that increases the *maximum* penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt." 530 U.S. at 476 (emphasis added).

Petitioner has never raised this argument before, and it cannot be reconciled with the petition for a writ of certiorari. There, petitioner represented to the Court that this case would be a good vehicle for addressing the constitutionality of judicial factfinding for mandatory minimums because "[u]nder § 924(c), a finding of brandishing or discharging increases the mandatory minimum, but the maximum remains the same as in the unenhanced penalty." Pet. 13. Even if petitioner were entitled to argue otherwise now, his original position was the correct one. As every court of appeals to address the issue has recognized, the subsections of Section 924(c)(1)(A) set forth mandatory minimums with a maximum sentence of life. See, *e.g.*, *United States* v. *Shabazz*, 564 F.3d 280, 288-289 (3d Cir. 2009) (citing cases).

2. *Harris* settles this issue. In concluding that brandishing and discharging did not create "steeply higher penalties," the Court reasoned in part that "[s]ince the subsections [of Section 924(c)(1)(A)] alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm." 536 U.S. at 554. And throughout its statutory-construction discussion, the Court repeatedly referred to Section 924(c)(1)(A)'s prescriptions of "not less than" five, seven, and ten years as "minimum[s]"

rather than fixed terms. *Id.* at 551-553; see *id.* at 569-572 (Breyer, J., concurring in part and concurring in the judgment); see also *id.* at 575-576 (Thomas, J., dissenting) (treating the statutory maximum as "life in prison"). That understanding of the statute was critical to the outcome of the case. Not only did it inform the statutory analysis, *id.* at 554, but the Court could not have affirmed an increase in the defendant's sentence based on judicial factfinding had the Court believed that the increase was to a statutory maximum, see *id.* at 550 (recognizing that a fact, other than a prior conviction, that increases a statutory maximum must be found by a jury). The Court's construction of the sentencing provisions of Section 924(c)(1)(A) as providing a uniform maximum—namely, "life imprisonment," *id.* at 574 (Thomas, J., dissenting)—is accordingly entitled to statutory *stare decisis* treatment.

Other decisions of this Court have likewise described the sentences in Section 924(c)(1) as "minimum" sentences. See *Abbott*, 131 S. Ct. at 22-23; *O'Brien*, 130 S. Ct. at 2177; *Dean*, 556 U.S. at 570. Petitioner's contrary construction would implausibly read the phrase "not less than [five, seven, or ten] years," 18 U.S.C. 924(c)(1)(A)(i)-(iii), to mean "not less than *and not more than* [five, seven, or ten] years." See *United States* v. *Dorsey*, 677 F.3d 944, 957 (9th Cir. 2012), petition for cert. pending, No. 12-6571 (filed Sept. 28, 2012). While that would be an odd construction under any circumstance, it is especially odd in this circumstance, because when Congress prescribes a statutory maximum, it ordinarily uses the phrase "not more than" expressly—as it has in Section 924's other provisions prescribing penalties for firearm violations. See, *e.g.*, 18 U.S.C. 924(a)(1)-(7), (b), (f), (g), (h), (i), (k), (*l*), (m), (n), (*o*) and

(p)(1)(A)(ii); accord 18 U.S.C. 930(a) and (b); 18 U.S.C. 930(e) (2006 & Supp. V 2011).

Petitioner derives no meaningful support for his construction from his citation (Pet. Br. 46) of *Stimpson* v. *Pond*, 23 F. Cas. 101 (C.C.D. Mass. 1855) (No. 13,455), in which Justice Curtis concluded that a patent-related statute authorizing a civil penalty of "not less than one hundred dollars" did not authorize higher fines. Terms of imprisonment, unlike fines, have a natural outer bound. Uncertainty over whether the legislature "confer[red] *unlimited* power over the estates of citizens" in a civil action for penalties under the patent laws, *id.* at 102 (emphasis added), does not translate to prison terms, which are necessarily bounded at life. See, *e.g.*, *People* v. *Raymond*, 96 N.Y. 38, 40 (1884) (observing, in the context of a forgery statute, that "the penalty prescribed was imprisonment for not less than ten years, and, therefore, might be for life").

3. Petitioner's countertextual reading also cannot be squared with the statute's history. The pre-1998 version of Section 924(c) did, in fact, provide for a fixed-term sentence, stating that a defendant who uses or carries a firearm during and in relation to a crime of violence or drug-trafficking crime "shall * * * be sentenced to imprisonment for five years." 18 U.S.C. 924(c)(1) (1994). Congress had good reason to believe that by adding a new phrase clearly imposing a mandatory minimum ("not less than"), the statute's sentencing provisions would be interpreted as mandatory minimums. That is especially true because this Court had previously read the phrase "not less than fifteen years" in a neighboring provision of Section 924 (18 U.S.C. 924(e)(1)) to prescribe "a mandatory minimum sentence of 15 years and a maximum of life in prison." *Custis* v. *United States*,

511 U.S. 485, 487 (1994); see *Smith* v. *City of Jackson*, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, * * * it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

Petitioner's amicus posits (NACDL Br. 11) that Congress added the new language simply to clarify that district courts could not impose sentences lower than those specified in the statute. But amicus offers no evidence that a sentence below the prior five-year fixed term had ever survived appellate review. And its argument overlooks Congress's choice to model Section 924(c)(1)(A)(ii) on language that this Court had already interpreted as establishing only a minimum, not a maximum. See *Custis*, 511 U.S. at 487. Finally, amicus's reliance on the constitutional-avoidance canon (NACDL Br. 22) is on no firmer ground here than in *Harris*: in light of *McMillan*, "Congress would have had no reason to believe that it was approaching the constitutional line." 536 U.S. at 555-556. The purpose of avoiding difficult constitutional questions—to avert "friction with our coordinate branch"—would not be served "by adopting a strained reading of a statute that Congress had enacted in reliance" on a decision of this Court. *Id.* at 556.

III. THIS COURT SHOULD REAFFIRM *HARRIS*'S HOLDING THAT LEGISLATURES MAY CONSTITUTIONALLY MANDATE MINIMUM SENTENCES BASED ON JUDICIALLY DETERMINED FACTS

Judicial factfinding is an intrinsic feature of many discretionary sentencing schemes, and no constitutional problem arises when a judge finds "facts that the judge deems relevant" in that context. *Booker*, 543 U.S. at

233; *Apprendi*, 530 U.S. at 481; see *Dillon* v. *United States*, 130 S. Ct. 2683, 2692 (2010) ("[W]ithin established limits, * * * the exercise of [sentencing] discretion does not contravene the Sixth Amendment even if it is informed by judge-found facts.") (italics and internal quotation marks omitted). Accordingly, as the sentencing court in this case correctly recognized, the court would have been free to find brandishing and impose a seven-year (or greater) sentence if, as petitioner argued, the sentencing range were five years to life. J.A. 51, 58. As a constitutional matter, the legislature's direction of such a rule for all sentencing judges is equally valid. That approach fosters consistency, gives expression to legislative policy, and exposes the defendant to no sentence that he could not have otherwise received. The approach precludes judicial discretion to grant greater leniency than the legislature desires. But removing such leniency does not offend *Apprendi*, which protects against judicial factfinding that "increase[s] the judge's power and diminish[es] that of the jury * * * [to] determine[] the *upper limits* of sentencing." *Booker*, 543 U.S. at 236 (emphasis added).

A. Mandatory Minimums Like Section 924(c)(1)(A) Assign A Uniform Minimum Weight To Facts Courts Have Long Been Authorized To Find

1. For as long as discretionary sentencing has existed, the information available to sentencing judges was not limited to the facts alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt. See, *e.g.*, *Williams*, 337 U.S. at 246 ("Out-of-court affidavits have been used frequently, and of course in the smaller communities sentencing judges naturally have in mind their knowledge of the personalities and backgrounds of convicted offenders."); see also *Harris*, 536

U.S. at 558 (plurality opinion). As a leading nineteenth-century treatise explained, "within the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment." 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 85, at 54 (2d ed. 1872) (Bishop). That was because any "aggravating circumstances" that the judge might find "cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy." *Ibid.* "Where the law permits the heaviest punishment, on a scale laid down, to be inflicted, and has merely committed to the judge the authority to interpose its mercy and inflict a punishment of a lighter grade, no rights of the accused are violated though in the indictment there is no mention of mitigating circumstances." *Ibid.*

Accordingly, this Court has recognized that nothing in the history of sentencing in this country "suggests that it is impermissible for judges to exercise discretion—taking into consideration various factors relating both to offense and offender—in imposing a judgment within the range prescribed by statute." *Apprendi*, 530 U.S. at 481 (emphasis omitted). And it has affirmatively upheld the constitutionality of that practice. See *Williams*, 337 U.S. at 251 ("In determining whether a defendant shall receive a one-year minimum or a twenty-year maximum sentence, we do not think the Federal Constitution restricts the view of the sentencing judge to the information received in open court."); see also

Harris, 536 U.S. at 558 (plurality opinion) (citing additional cases).

2. Statutory mandatory minimums represent a legislative effort to make judges' sentencing decisions more consistent. Beginning in the 1970s, the disparities produced by indeterminate sentencing regimes underwent increasing criticism. See Arthur Campbell, *Law of Sentencing* § 1:3, at 9-10 (2d ed. 1991) (Campbell); Peter Hoffman & Michael Stover, *Reform in the Determination of Prison Terms: Equity, Determinacy, and the Parole Release Function*, 7 Hofstra L. Rev. 89 (1978); *e.g.*, Task Force Report 3-9; Am. Friends Serv. Comm., *Struggle for Justice* (1971). In the wake of those criticisms, one popular sentencing reform was increased use of mandatory minimum prison terms. See Campbell §§ 1:3, 4:2, 4:5, at 13, 73-74, 80-83; Task Force Report 16; Kate Stith & Jose Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 123 (1998) (*Fear of Judging*). Such laws specified minimum sentences—within the sentencing range otherwise specified for the crime of conviction—that should attach to the finding of specific aggravating factors such as repeat offender status, use of a firearm or other dangerous weapon during the offense, the particular vulnerability of the victim, or the amount of drugs involved in narcotics offenses. See *Fear of Judging* 123, 210 n.38; Gary Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Calif. L. Rev. 61, 69, 70-71 & nn.37-48 (1993); Sandra Shane-DuBow et al., *Sentencing Reform in the United States: History, Content, and Effect* (1985).

As generally formulated, mandatory minimum sentences are a feature of the sentencing process, not a part of the definition of crimes. They replicate—but make

more uniform—a policy judgment that a sentencing court could make itself. If a particular sentencing judge characteristically imposed a minimum sentence of seven years on defendants who brandished firearms (rather than merely carrying them or using them in a less dangerous way), that practice would not redefine the crime for which the sentences were imposed or require that the fact of brandishing to be charged in the indictment and proved at trial beyond a reasonable doubt. Cf. 1 Bishop § 85, at 54 (describing the imposition of a heightened sentence based on aggravating factors as "an entirely different thing from punishing one for what is not alleged against him"). Nor would a sentencing factor be transformed into an "element" if sentencing judges, after conducting a survey that revealed that most judges imposed such a minimum sentence, agreed that each judge would follow the general practice. See Campbell § 1:3, at 13-14 (discussing experimentation with voluntary sentencing guidelines in the 1970s). Likewise, when a legislature "simply [takes] one factor that has always been considered by sentencing courts to bear on punishment * * * and dictate[s] the precise weight to be given that factor" within the range already available to the judge, it is not creating a new crime, but is providing "additional guidance" to the sentencing court. *McMillan*, 477 U.S. at 89-90, 92; see *Harris*, 536 U.S. at 559 (plurality opinion) (similar).

3. Legislatures have valid reasons for mandating the transparent and uniform treatment of particular sentencing factors, rather than defining new aggravated offenses with elements that must be alleged in the indictment and found by the jury. First, creating new crimes with multiple factors could complicate indictments and trials—particularly if relevant facts might be

expected to emerge at sentencing. A wide array of facts bears on the appropriate sentence, see, *e.g.*, *Williams*, 337 U.S. at 246, and a legislature might determine that specific facts warrant imposition of a mandatory minimum term. A legislature may conclude that those more fine-grained determinations are collateral to the basic question of guilt and better addressed at sentencing.

Second, legislatures could reasonably desire to permit litigation of the specific way a basic offense was committed without forcing a defendant to make inconsistent arguments before a jury. "In many cases, a defendant, claiming innocence and arguing, say, mistaken identity, will find it impossible simultaneously to argue to the jury that the prosecutor has overstated the drug amount. How, the jury might ask, could this 'innocent' defendant know anything about the matter?" *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment); see, *e.g.*, *Monge* v. *California*, 524 U.S. 721, 729 (1998) (noting the existence of "cases in which fairness calls for defining a fact as a sentencing factor"). Although that problem might potentially be addressed through additional procedures such as bifurcated trials, a legislature might view judicial factfinding as a way to achieve some degree of sentencing consistency without placing such additional burdens on courts, jurors, and witnesses.

Third, legislatures might conclude that separating mandatory minimums into different offenses will give too much power to prosecutors, "who can determine sentences through the charges they decide to bring." *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment). The effect would be particularly significant in plea bargaining, which resolves well above 90% of all state and federal criminal

cases. See *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012). If the indictment charges a series of graduated offenses, each with a higher minimum sentence, the selection of the offense to which the defendant pleads would provide a great deal of control over the ultimate sentence. Such a scheme would thus, as a practical matter, "take from the judge the power to make a factual determination, while giving that power not to juries, but to prosecutors." *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment).

Finally, a legislature could reasonably conclude that mandatory minimum sentencing factors, rather than new offense elements, would enhance sentencing consistency by permitting effective appellate review. Under double jeopardy principles, the prosecution may not appeal a jury's finding of insufficient evidence of a fact that constitutes an element of the offense. See *United States* v. *Scott*, 437 U.S. 82, 91 (1978). Appeals of a judge's finding do not present that problem and thus "should lead to a greater degree of consistency in sentencing." *United States* v. *DiFrancesco*, 449 U.S. 117, 143 (1980).

B. *Harris* And *McMillan* Correctly Concluded That The Constitution Permits Legislatures To Calibrate Judicial Sentencing Decisions Through Mandatory Minimums

Congress's regulation of sentencing through the mandatory minimum provisions in Section 924(c)(1)(A)(ii) is constitutionally valid. Notwithstanding petitioner's claim (Pet. Br. 36) that the Court "broke with tradition" when it upheld the mandatory minimum sentences in *McMillan* and *Harris*, petitioner and his amici cite not a single authority, from any period in this Nation's history, that would foreclose a legislature from specifying a

minimum sentence, within the otherwise existing range, triggered by a judicial finding of a particular fact.

1. **McMillan *and* Harris *are consistent with* Apprendi**

Petitioner's primary constitutional argument (Pet. Br. 8, 11-28) is that *McMillan* and *Harris* conflict with *Apprendi*. But this Court has consistently recognized that *Apprendi*'s holding addresses only statutory maximums: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490 (emphasis added); see *Southern Union Co.* v. *United States*, 132 S. Ct. 2344, 2350 (2012) (quoting from that statement); *Dillon*, 130 S. Ct. at 2696 (same); *Oregon* v. *Ice*, 555 U.S. 160, 167 (2009) (same); *Cunningham* v. *California*, 549 U.S. 270, 282 (2007) (same); *Washington* v. *Recuenco*, 548 U.S. 212, 216 (2006) (same); *Booker*, 543 U.S. at 228 (same); *Blakely* v. *Washington*, 542 U.S. 296, 301 (2004) (same); *Schriro* v. *Summerlin*, 542 U.S. 348, 350 (2004) (same); see also *O'Brien*, 130 S. Ct. at 2174-2175 (similar); *Ring* v. *Arizona*, 536 U.S. 584, 588 (2002) (similar). Nothing in the holding, or the reasoning, of *Apprendi* precludes legislatures from prescribing mandatory *minimums* based on judicially determined facts.

a. *The holding of* Apprendi. The defendant in *Apprendi* pleaded guilty to a state firearm offense punishable by a term of imprisonment between five and ten years. 530 U.S. at 470. The sentencing judge subsequently determined "that the crime was motivated by racial bias" and applied a separate "hate crime" law that provided for an "extended term" of ten to 20 years of imprisonment. *Id.* at 468-469, 471 (internal quotation marks and citations omitted). The sentencing court

imposed a 12-year term on that count, two years higher than it could have imposed without the judicial finding that activated the hate-crime law. *Id.* at 471.

This Court found that sentencing procedure to be unconstitutional. *Apprendi*, 530 U.S. at 497. The Court was troubled by the "novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-483. And it derived from historical practices the rule that "facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense" that had to be charged in an indictment and found by a jury beyond a reasonable doubt. *Id.* at 483 n.10.

Apprendi decided the constitutionality only of judicial factfinding that raised statutory maximums. The question presented in *Apprendi* was limited to the constitutionality of "an increase in the maximum prison sentence," 530 U.S. at 469, and the Court's holding turns on factfinding that resulted in a sentence in excess of the "prescribed statutory maximum," *id.* at 490. The Court's treatment of *McMillan* made the scope of its decision even clearer: "We do not overrule *McMillan*," the Court explained, but instead "limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict." *Id.* 487 n.13. The Court "reserve[d] for another day" the question whether "reconsideration" of *McMillan* would be warranted. *Ibid.* That day came in *Harris*, and the Court there "[r]eaffirm[ed] *McMillan*." 536 U.S. at 568.

Petitioner's broader reading of *Apprendi* hinges primarily on the Court's statement that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." 530 U.S. at 490 (quoting *Jones*, 526 U.S. at 252-253 (Stevens, J., concurring)); see, *e.g.*, Pet. Br. 7, 19-20. But that statement immediately followed the Court's limitation of its rule to "any fact that increases the penalty for a crime beyond the prescribed statutory maximum," which this Court has consistently reiterated as *Apprendi*'s holding. 530 U.S. at 490; see p. 31, *supra*. The Court's reference to an "increase [in] the prescribed range of penalties," 530 U.S. at 490, must be understood in that context, *i.e.*, to denote a sentencing range whose maximum is higher than the original range. As the Court recently summed up in *Southern Union*, "exactly what *Apprendi* guards against [is] judicial factfinding that enlarges the maximum punishment a defendant faces beyond what the jury's verdict or the defendant's admissions allow." 132 S. Ct. at 2352.

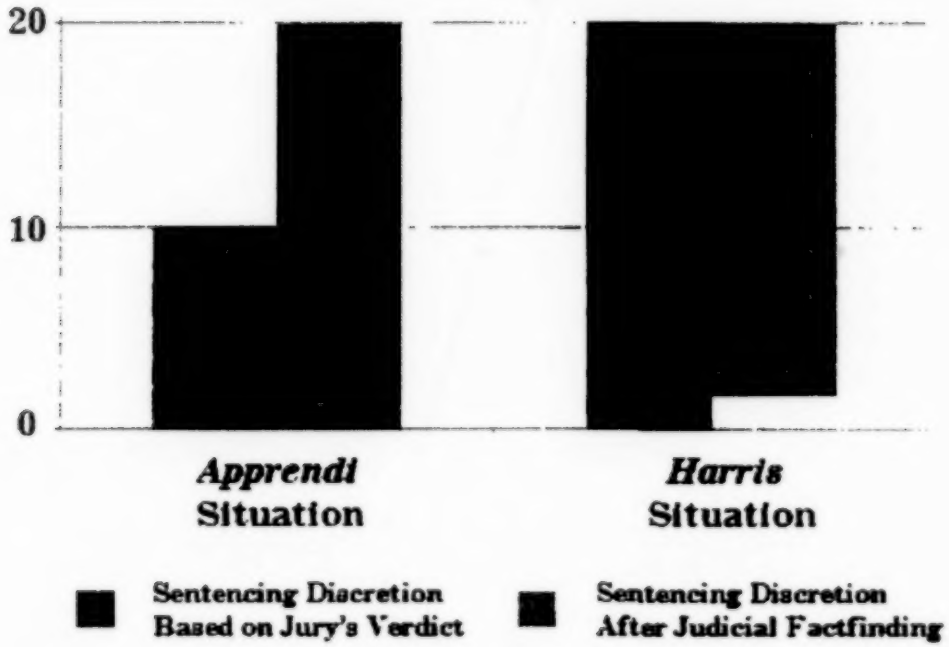
All of the post-*Apprendi* decisions enforcing its rule have involved, like *Apprendi* itself, "sentencing schemes that allowed judges to find facts that increased a defendant's maximum authorized sentence." *Southern Union*, 132 S. Ct. at 2350; see *id.* at 2352 (increased "maximum fine"); *Cunningham*, 549 U.S. at 274 (increased "upper term" of imprisonment); *Booker*, 543 U.S. at 226-227 (increased sentence beyond maximum prescribed by then-binding Federal Sentencing Guidelines); *Blakely*, 542 U.S. at 299-300 (increased sentence above "standard range" in statutory guidelines); *Ring*, 536 U.S. at 588-589 (aggravating factors that authorize death sentence).

Contrary to the suggestion of one of petitioner's amici, *United States* v. *Booker*, *supra*, does not call into question the constitutionality of judicial factfinding for mandatory minimums. See Ctr. on the Admin. of Crim. Law Amicus Br. 17-20 (Center Br.). *Booker* faulted the mandatory federal Sentencing Guidelines because they established a maximum sentence that was effectively binding on the court and that, in Booker's case, relied on judicial factfinding to exceed the sentence based on the facts found by the jury alone. 543 U.S. at 232-235. Amicus claims that *Booker* must have turned "the *mandatory* effect of the factual finding," and not its impact on the maximum sentence, because Booker's own sentence "was below the statutory maximum." Center Br. 18-19. Amicus misconceives "the 'statutory maximum' for *Apprendi* purposes." *Booker*, 543 U.S. at 232 (quoting *Blakely*, 542 U.S. at 303). *Booker* applied the definition of the "statutory maximum" announced in *Blakely*: "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Ibid.* (quoting *Blakely*, 542 U.S. at 303). Even if a higher statutory maximum is theoretically available, as it was in *Booker*, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-304. *Booker* thus summed up its decision as "reaffirm[ing] our holding in *Apprendi*" that, other than the fact of a prior conviction, judicial factfinding cannot "support a sentence exceeding the maximum authorized" by the plea or the jury's verdict. 543 U.S. at 244. It did not establish a new rule that turns solely on a factfinding's "mandatory effect." Center Br. 19.

b. *The distinction between the* Apprendi *problem and mandatory minimum schemes.* The holding of *Apprendi* responds to a problem not presented by mandatory minimum statutes. *Apprendi* protects the jury's role in determining the facts that establish the upper limit of the court's sentencing authority; it precludes "a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 530 U.S. at 482-483. A scheme that allows extended maximums based on judicial factfinding could reduce the jury's verdict to "low-level gatekeeping," *Jones*, 526 U.S. at 244, after which the judge's factfindings could dramatically enhance the zone of judicial discretion to impose a harsher sentence. See *Blakely*, 542 U.S. at 306-307. Section 924(c)(1)(A)(ii) does not permit that result. Instead, the jury's verdict embraces a serious offense that itself authorizes the judge to exercise discretion up to the full statutory maximum. The judge's factfinding in accordance with the statute then constrains his discretion to exercise leniency in the exercise of that authority.

The distinction between the *Apprendi* situation and the mandatory minimum situation is illustrated below:

Zones of Sentencing Discretion Based on Judicial Factfinding



In the first situation, involving a statute that limits the judge to ten years unless he makes an additional factual finding (say, biased purpose) that authorizes him to impose a sentence up to 20 years, the biased-purpose finding "extend[s] the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury." *Harris*, 536 U.S. at 567 (plurality opinion). In the second situation, by contrast, under which the judge has a 20-year range based on the jury's verdict, but must impose a minimum of two years if he finds, say, brandishing of a firearm, the finding "restrain[s] the judge's power, limiting his or her choices within the authorized range." *Ibid.* "It is quite consistent to maintain that the former type of fact must be

submitted to the jury while the latter need not be." *Ibid.* Only in the former situation is the judge empowered to "inflict punishment that the jury's verdict alone does not allow." *Southern Union*, 132 S. Ct. at 2350 (quoting *Blakely*, 542 U.S. at 304) (brackets omitted).

c. *The purposes of* Apprendi *in relation to mandatory minimum sentencing schemes.* The underlying purposes of the *Apprendi* rule—to protect the role of the jury, and grand jury, and the stringent burden of proof in criminal cases—are not implicated by mandatory minimum schemes.

Mandatory minimums triggered by judicial factfinding do not undermine the jury-trial right's protection "against the corrupt or overzealous prosecutor and against the compliant, biased, and eccentric judge." *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). A harsh or prejudiced judge can impose a longer sentence within the duly-authorized range, whether or not it is mandated. And an overzealous prosecutor can seek such a sentence, whether or not it is required. Even if a jury were to reject the factual predicate for the mandatory increase under the reasonable-doubt standard, the sentencing court would remain free to find the same fact by a preponderance of the evidence and to impose the same sentence. See *Watts*, 519 U.S. at 157. Or the judge could impose the heightened sentence as a matter of his discretion without making any additional formal factfindings at all.

For similar reasons, mandatory minimums triggered by judicial factfinding also do not undermine the reasonable-doubt standard's protection against erroneous deprivations of liberty and impositions of stigma. See *Apprendi*, 530 U.S. at 484; *In re Winship*, 397 U.S. 358, 363-364 (1970). The constitutional error identified in

Apprendi was the imposition of a 12-year sentence that was "above the 10-year maximum for the offense charged." 530 U.S. at 474; see, *e.g.*, *Blakely*, 542 U.S. at 303 ("In this case, petitioner was sentenced to more than three years above the 53–month statutory maximum of the standard range."). But in the mandatory minimum context, the jury's verdict by itself exposes the defendant to the punishment that he receives. The loss of liberty and stigma associated with a particular sentence do not increase simply because the sentence was guided by a legislative mandatory minimum, rather than solely by the judge's exercise of sentencing discretion. While a mandatory minimum, when applicable, will have the practical impact of foreclosing a sentence at the lower end of what the jury's verdict would authorize, *Apprendi* does not create any right to "the mercy of a tenderhearted judge," 530 U.S. at 498 (Scalia, J., concurring), with unlimited discretion to impose any sentence below the maximum.

Nor do mandatory minimums based on judicial fact-finding undermine the protections of the Grand Jury Clause. One function of the indictment produced by a grand jury is to provide the defendant with notice of the charge and enable him to plead double jeopardy. *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 108 (2007). An indictment can fulfill those functions without alleging facts that bear on a mandatory minimum—a matter that effective counsel will surely cover with the defendant before he elects trial or pleads guilty. See also Fed. R. Crim. P. 11(b)(1)(I) (requiring a judge at a guilty plea colloquy to address "any mandatory minimum penalty"). Another function of the Grand Jury Clause is to assure that a criminal charge will be "founded upon reason" and not "dictated by an intimidating power or by

malice and personal ill will." *Wood* v. *Georgia*, 370 U.S. 375, 390 (1962). But a grand jury protects that value by the necessity that it find probable cause to charge an offense that authorizes a *maximum* punishment available; having done so, it necessarily has exposed the defendant to any lesser sentence, whether based on factfinding by the court in a discretionary system or factfinding to establish a mandatory minimum. The grand jury has no role in sentencing and is "not [to] consider punishment in the event of conviction." Judicial Conference of the United States, *Model Grand Jury Charge* ¶ 10, Mar. 2005, http://www.uscourts.gov/FederalCourts/JuryService/ModelGrandJuryCharge.aspx.

As the foregoing discussion makes clear, the concern of one of petitioner's amici that judicially triggered mandatory minimums will provide a "loophole" to circumvent *Apprendi* (Center Br. 29) is unfounded. The Court in *Apprendi* recognized that the rule it adopted did not foreclose every sentencing scheme that a creative legislature might theoretically devise, but it emphasized that the rule "ensures that a State is obliged to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices of exposing all who are convicted to the maximum sentence it provides." 530 U.S. at 490 n.16 (internal quotation marks and citation omitted). And it reasoned that this obligation of transparency, together with "structural democratic constraints," would provide powerful protection for criminal defendants. *Ibid.*

d. *The support for a limited reading of* Apprendi *in* Oregon *v.* Ice. Petitioner's broad reading of *Apprendi* is also difficult to square with this Court's decision in *Oregon* v. *Ice*, *supra*. In that case, the Court addressed the

constitutionality of an Oregon sentencing scheme that required sentences for multiple offenses to run concurrently unless the judge found certain facts. 555 U.S. at 163, 165. The Court upheld the scheme, declining to "extend *Apprendi*'s rule to the imposition of sentences for discrete crimes." *Id.* at 168. The Court observed that, historically, the choice between concurrent and consecutive sentences "rested exclusively with the judge," *ibid.*, and that "state legislative innovations like Oregon's seek to rein in the discretion judges possessed at common law to impose consecutive sentences at will," *id.* at 171.

Recognizing that "[l]imiting judicial discretion to impose consecutive sentences serves the 'salutary objectives' of promoting sentences proportionate to 'the gravity of the offense' and of reducing disparities in sentence length," the Court refused "[t]o hem in States" by constitutionalizing one particular sentencing methodology. *Ice*, 555 U.S. at 171 (quoting *Blakely*, 542 U.S. at 308). The Court also expressed concern about "how many other state initiatives would fall" if it adopted the proposed expansion of *Apprendi*. *Id.* at 171-172. The Court was additionally reluctant, "absent any genuine affront to *Apprendi*'s instruction," to "burden the Nation's trial courts" with the "bifurcated or trifurcated trials" that might be necessary to establish "predicate facts for consecutive sentences" that "could substantially prejudice the defense at the guilt phase of a trial." *Id.* at 172.

Petitioner's view that *Apprendi* requires submission to juries of "facts that increase the range of punishment to which a criminal defendant is exposed," Pet. Br. 9, is hard to reconcile with *Ice*. *Ice* allows for judicial fact-finding in multiple-count convictions that "increase[s] the range of punishment" beyond the range established

by the jury's verdict. *Ice* would also permit a legislature to make consecutive sentencing mandatory, thus effectively establishing mandatory minimum sentences greater than the judge might otherwise have imposed. The formality that *Ice* involved two convictions, rather than only one (as under Section 924(c)(1)), has no substantive effect on the defendant's interests. In each instance, the minimum sentence within an authorized range would increase, thus depriving the defendant of a measure of judicial discretion. For all of the reasons discussed in *Ice*, mandatory minimum sentencing provisions can validly express the legislature's intent "to rein in the discretion judges possessed," with the "'salutary objectives' of promoting sentences proportionate to 'the gravity of the offense' and of reducing disparities in sentence length." *Ice*, 555 U.S. at 171 (quoting *Blakely*, 542 U.S. at 308).

In addition, as in *Ice*, an extension of *Apprendi* to mandatory minimum provisions based on petitioner's formulation might cast doubt upon other legislative efforts. *Ice*, 555 U.S. at 171-172. Most prominently, legislatures have long established affirmative defenses that place the burden of proof on defendants in order to justify a lower sentencing ceiling. See *Patterson* v. *New York*, 432 U.S. 197, 201-202 (1977). Legislatures also establish mitigating factors that preclude harsher punishment. See, *e.g.*, 18 U.S.C. 3559(c)(3). In *Apprendi*, this Court recognized that these practices do not run afoul of the Court's rule. See 530 U.S. at 485 n.12, 491 n.16. Yet the "fact" that supports an "increase in the range of punishment"—the absence of a mitigating factor—will not have been submitted to the jury and will not have been negated "beyond a reasonable doubt." Pet. Br. 9. Petitioner's expansion of *Apprendi* would

therefore call established sentencing practices into question.

2. ***History casts no doubt on the constitutionality of mandatory minimum sentencing factors***

Because "'the scope of the constitutional jury right must be informed by the historical role of the jury at common law,'" this Court has extended the *Apprendi* rule only when "ample historical evidence" supports doing so. *Southern Union*, 132 S. Ct. at 2353, 2356 (quoting *Ice*, 555 U.S. at 170). As the plurality concluded in *Harris*, "historical evidence showing that facts increasing the defendant's minimum sentence (but not affecting the maximum) have, as a matter of course, been treated as elements * * * is lacking." 536 U.S. at 560. As in *Harris*, petitioner and his amici cite no historical example of mandatory minimum provisions like Section 924(c)(1)(A), and the historical analogies they invoke are readily distinguishable.

a. Statutory provisions that require imposition of a minimum sentence without also increasing the statutory maximum did not come into general use until the twentieth century. See Nancy King & Susan Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1474-1477 (2001). Therefore, courts in the nineteenth century were not generally "presented with the necessity of deciding whether a fact, other than prior conviction, that triggers a mandatory minimum sentence *but not a higher maximum sentence*, was an essential ingredient of an offense that must be pled in the indictment and proven to a jury beyond a reasonable doubt." *Id.* at 1474. For that reason, history cannot justify extending *Apprendi*'s reach to mandatory minimum sentencing statutes.

b. One of petitioner's amici nevertheless contends that "the framers *were* familiar with statutes that * * *

removed discretion that a judge otherwise would have had to impose a more lenient sentence." Families Against Mandatory Minimums Amicus Br. 5 (FAMM Br.). But neither of the practices it identifies demonstrates an original understanding that legislatures could not link mandatory minimum sentencing provisions to judicially determined facts.

(i) *Statutory offenses.* The first practice is the requirement that a charging instrument identify the elements of a statutory offense to support a penalty above the comparable common law crime. FAMM Br. 8-16. This example illustrates only the uncontested principle that an indictment must charge all the elements of the specific statutory *or* common-law offense to support a conviction for that specific offense. See, *e.g.*, *O'Brien*, 130 S. Ct. at 2174 ("Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt."). As FAMM acknowledges, statutory offenses, while often modeled on the common law, were generally not written as sentencing provisions that aggravated the punishment for a preexisting common-law offense, but instead "would usually specify both *the elements of the offense and* the resulting punishment." FAMM Br. 10 (emphasis added). See, *e.g.*, *Gregory* v. *Commonwealth*, 32 Ky. (2 Dana) 417, 417 (1834) (FAMM Br. 15) (statute declared that "when any fence shall be made across or in any public road, the owner or tenant of the land shall pay" a particular penalty; indictment had to allege ownership or tenancy to invoke this provision); *Hope* v. *Commonwealth*, 50 Mass. (9 Met.) 134, 137 (1845) (FAMM Br. 14) (discussing a larceny indictment that failed to charge "the value of the property stolen" as prescribed in "[o]ur statutes," presumably referring to Mass. Rev. Stat., ch. 126, § 17 (1836), which

included elements of the offense ("by stealing of the property of another") and punishment graded by the property's value); see also *Apprendi*, 530 U.S. at 502-503 & n.3 (Thomas, J., concurring) (discussing *Hope*).

A statutory provision that specifies both the elements of an offense and the punishment for that offense was (and still is) properly understood to constitute a separate crime from a common-law analogue. See, *e.g.*, Joel Prentiss Bishop, *Commentaries on the Law of Statutory Crimes* § 250, at 234 (2d ed. 1883) ("Where the offense which a statute creates is such also at the common law, and the statute and common law are not repugnant, all new provisions thus legislatively ordained are cumulative, and the procedure may conform to either law."). It is therefore unexceptional that early courts required the prosecution to set forth the particular elements of the statutory offense in order to obtain a conviction on that offense. See, *e.g.*, *United States* v. *Mills*, 32 U.S. 138, 142 (1833) (referring to the "general rule" for "indictments for misdemeanors created by statute"); *United States* v. *Lindsay*, 26 F. Ca. 971, 971 (C.C.D.C. 1805) (No. 15,602) (indictment "d[id] not sufficiently set forth any offence under either of the acts of Maryland," but did "state[] an offence at common law"); *Gregory*, 32 Ky. (2 Dana) at 417 (indictment "does not contain a charge which can be deemed a violation of [the] enactment"); *State* v. *McLeran*, 1 Aik. 311, 313-314 (Vt. 1826) (act charged in the indictment "is not forgery within the statute," but did establish "a crime at common law"); *Commonwealth* v. *Hoxey*, 16 Mass. (16 Tyng) 385, 387 (1820) (indictment "charge[d] the offence to have been committed *contra formam statuti*; but no statute is found to describe the offence as alleged"); *Commonwealth* v. *Boyer*, 1 Binn. 201, 208 (Pa. 1807) (Smith, J.)

(referring to the legislative "act" as "*creating* the crimes * * * for which the defendant has been indicted").

(ii) *Benefit of clergy.* The practice of charging facts that would preclude the "benefit of clergy" procedure likewise has no material bearing on modern mandatory minimums. FAMM Br. 16-22. Benefit of clergy originated in medieval England as "a procedural device that effected a transfer from the secular to the ecclesiastical jurisdiction" and thereby allowed a defendant to avoid the mandatory judgment of death that typically attached to a felony conviction. *Mullaney* v. *Wilbur*, 421 U.S. 684, 692 (1975); see 5 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* 365-366 (1803) (5 *Blackstone's Commentaries*). By colonial times, nearly any first-time felon could avoid a capital judgment by invoking the legal fiction that the ecclesiastical court would take over his case, although claiming the benefit of that procedure often required the defendant to accept "being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment." 5 *Blackstone's Commentaries* 373.

Legislatures would sometimes eliminate the benefit of clergy procedure in cases involving certain statutory or common-law offenses committed in particular circumstances. See, *e.g.*, 1 Brev. Dig., tit. 21, § 2 (S.C. 1814) (withdrawing benefit of clergy for, *inter alia*, "robbing of any churches, chapels, or other holy places"). As the amicus notes (FAMM Br. 20-22), various contemporary authorities stated that the circumstances rendering benefit of the clergy unavailable had to be charged in the indictment. That requirement, however, did not reflect a limitation on legislatures' ability to constrain judges'

sentencing authority. Contrary to the amicus's contention (*id.* at 20), statutes eliminating benefit of the clergy did not remove a "lesser punishment" to which a judge could otherwise "sentence" a defendant. Benefit of clergy was neither a "punishment" nor a "sentence," but instead "operat[ed] as a kind of statute pardon." 5 *Blackstone's Commentaries* 373.

Consistent with its origins as a jurisdictional doctrine, benefit of clergy was a procedural escape hatch for avoiding criminal judgment and sentencing altogether. The only sentence prescribed by law for a capital felony was death. See 5 *Blackstone's Commentaries* 373-374 (describing clergyable offenses); *id.* at 376 (describing the "judgment" available for such offenses); see also *Tennessee* v. *Garner*, 471 U.S. 1, 13 n.11 (1985) (describing common-law capital punishment). A court would impose that sentence by entering "judgment" against the defendant. 5 *Blackstone's Commentaries* 376. A request for benefit of clergy was not a request for a certain type of judgment, but was instead a "motion[] *in arrest of* judgment." *Ibid.* (emphasis added). And the granting of the motion did not constitute the imposition of a sentence, but instead operated to preclude a criminal judgment from being entered at all. See *id.* at 375-376; see also *id.* at 365 ("After trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstances; of which the principal is, *the benefit of clergy.*"). Although the defendant might be subjected to "branding, fine, whipping, [or] imprisonment" in return for receiving benefit of clergy, those were "concomitant conditions" of "receiving [the] indulgence," rather than a form of substantive punishment. *Id.* at 373. Indeed, as Attorney General Pinckney explained to this Court in

1813, because benefit of clergy simply resulted in a "final stay of the proceedings," rather than a "judgment," a defendant who received benefit of clergy could not file an appellate writ of error. *Livingston* v. *Dorgenois*, 11 U.S. (7 Cranch) 577, 582-583 (1813) (presentation of Attorney General Pinckney); see *Long's Case*, (1596) 78 Eng. Rep. 740, 741 (K.B.) (declining to entertain defendant's writ of error because "when he prayed his clergy, which was allowed him, there never was any judgment afterwards given").

The Framers would accordingly have understood a statute eliminating the benefit of clergy procedure as quite distinct from a substantive sentencing statute prescribing a mandatory minimum within a statutory range. A statute eliminating benefit of clergy could lead to a motion to arrest judgment based on defects in the indictment, and "in favour of life, great strictness [was] at all times * * * observed, in every point of an indictment." 5 *Blackstone's Commentaries* 375. Sentencing provisions, in contrast, would be relevant to the entry of judgment itself, which, for certain non-capital offenses, involved the imposition of a "discretionary length of imprisonment." *Id.* at 378. And the choice of sentence within the permissible range was not tied to the indictment, but was instead left for the judge to decide. *Ibid.* (explaining that a prison sentence was something that "courts [were] enabled to impose," as the "duration * * * must frequently vary, from the aggravations or otherwise of the offence, the quality and condition of the parties, and from innumerable other circumstances").

Nothing demonstrates that the Framers would have foreclosed additional legislative guidance for judges in the exercise of their sentencing authority. To the contrary, more determinate sentences were the norm, with

indeterminate sentencing something of an anomaly. See 5 *Blackstone's Commentaries* 376-377. Blackstone ranked as "one of the glories of our English law, that the species, though not always the quantity or degree of punishment, is *ascertained* for every offence; at that it is not left in the breast of any judge, nor even of a jury, to alter that judgment, which the law has beforehand ordained, for every subject alike." *Id.* at 377. In light of that background, it is doubtful that legislative efforts to also make the "quantity or degree of punishment" more predictable would have been objectionable.

c. To the extent that nineteenth-century practices after the Founding era are considered evidence of the Constitution's original meaning, petitioner fails to identify anything from that period that demonstrates a constitutional bar on judicially triggered mandatory minimums. Petitioner primarily relies on broad generalizations about the role of the jury, and his proffer of specific historical evidence consists principally of three cases cited in Justice Thomas's concurring opinion in *Apprendi*. See Pet. Br. 33. In each of those cases, however, the aggravating fact raised not only the minimum, but also the maximum, of the sentencing range.

In *Lacy* v. *State*, 15 Wis. 13 (1862), the statutory scheme made arson of a dwelling house punishable by three to ten years of imprisonment and made arson of a lawfully occupied dwelling house punishable by seven to 14 years of imprisonment. *Id.* at 15. The defendant received a 14-year sentence (four years above the default ten-year maximum), and the court reversed because the indictment had not alleged that the house was occupied. *Ibid.* In *Garcia* v. *State*, 19 Tex. Ct. App. 389 (1885), the statutory scheme made assault with intent to murder punishable by two to seven years of imprison-

ment and made such assault "with a bowie-knife or dagger" punishable by four to 14 years of imprisonment. *Id.* at 393. The defendant received a ten-year sentence (three years above the default seven-year maximum), and the court reversed because the indictment had not alleged use of a bowie knife or dagger. *Ibid.* And in *Jones* v. *State*, 63 Ga. 141 (1879), the statutory scheme made daytime burglary punishable by three to five years of imprisonment and made nighttime burglary punishable by five to 20 years of imprisonment. *Id.* at 144. The court concluded, among other things, that an indictment failing to specify whether the burglary occurred in daytime or nighttime was subject to dismissal. *Id.* at 143.

Each of these cases fits within *Apprendi*'s statutory-maximum rule, and in none of them did the court express particular concern about the increase to the lower end of the statutory range. In fact, only one of the cases cited by Justice Thomas in his *Apprendi* concurrence appears to have involved a fact that increased only the minimum penalty. That case, *People* v. *Coleman*, 145 Cal. 609 (1904), involved California's robbery statute, which increased the mandatory minimum penalty from one year to ten years if the defendant had a prior robbery conviction. *Id.* at 610-611. A separate California statute required the fact of the prior conviction to be found by the jury. *Id.* at 611. The court upheld the constitutionality of that procedure, but it did not hold that any constitutional principle required jury determination of the prior conviction. See *id.* at 611-615; cf. *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (finding constitutionally unproblematic use of a prior conviction to enhance a sentence).

To the contrary, earlier that year, the Supreme Court of California had reaffirmed an 1862 decision upholding

the constitutionality of a statutory procedure that permitted a judge, rather than a jury, to determine the degree of the offense a defendant had committed "for the purpose of fixing the punishment" following a guilty plea. *People* v. *Chew Lan Ong*, 75 P. 186, 187 (Cal. 1904) (quoting *People* v. *Noll*, 20 Cal. 164, 165 (1862)); see, *e.g.*, *People* v. *Jefferson*, 52 Cal. 452, 453-455 (1877). Several other States (but not all States) followed a similar practice. See Jonathan F. Mitchell, Apprendi's *Domain*, 2006 Sup. Ct. Rev. 297, 339 & n.226 (citing cases); see, *e.g.*, *Wicks* v. *Commonwealth*, 2 Va. Cas. 387, 392 (Va. Gen. Ct. 1824) (quoting Virginia law specifying that on a guilty plea for murder, "the Court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly") (emphasis omitted).

Nineteenth-century decisions of the New York Court of Appeals likewise rebut the notion that narrowing the permissible scope of punishment within a statutory range was exclusively the province of the jury. In *Johnson* v. *State*, 55 N.Y. 512 (1874), that court treated a defendant's prior conviction as an element in a context where it raised the maximum punishment from five to ten years. *Id.* at 513-514; see 2 N.Y. Rev. Stat. 699, § 8.2 (1829). But in *People* v. *Raymond*, *supra*, that same court stated that a defendant's prior conviction "was *not* an element of" an offense when that prior conviction raised the sentencing range from ten years to life in prison to mandatory life imprisonment. 96 N.Y. at 39 (emphasis added). The only way to reconcile the two cases is that *Johnson* involved an increase in the maximum penalty while *Raymond* involved an increase to the minimum penalty. That is also what separates this case

from *Apprendi* and warrants a different constitutional conclusion.

C. *Stare Decisis* Supports The Continuing Validity Of *McMillan* And *Harris*

"Whether or not" the Court "would agree with" the reasoning or result of *McMillan* and *Harris* today, "principles of *stare decisis* weigh heavily against overruling" them. *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). Although "*stare decisis* is not an inexorable command, * * * even in constitutional cases, the doctrine carries such persuasive force that [the Court has] always required a departure from precedent to be supported by some special justification." *Ibid.* (internal quotation marks and citations omitted). If "mere demonstration that [an] opinion was wrong" were sufficient to justify overruling it, the doctrine of *stare decisis* "would be no doctrine at all." *Hubbard* v. *United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment).

Petitioner's primary argument (Pet. Br. 39-41) for casting *stare decisis* aside is that judicial factfinding that increases a mandatory minimum sentence cannot logically be reconciled with *Apprendi*. But that repeats his merits argument; it does not provide special justification for overruling two precedents—especially when one of those precedents (*Harris*) post-dates *Apprendi*. Although petitioner correctly points out (*id.* at 41) that only a plurality of the Court in *Harris* expressly distinguished *Apprendi*, a majority of the Court in *Harris* expressly "[r]eaffirm[ed] *McMillan*," notwithstanding *Apprendi*. 536 U.S. at 568. And this Court's more recent cases have consistently reinforced the constitutional distinction between statutory maximums and mandatory minimums by repeatedly describing the *Apprendi*

rule to reach only maximum-enhancing facts. See p. 31, *supra*.

Although reliance interests may be diminished with respect to some rules of criminal procedure, see *Payne*, 501 U.S. at 828, *stare decisis* "has special force when legislators or citizens have acted in reliance on a previous decision, for in th[at] instance overruling the decision would * * * require an extensive legislative response." *Hubbard*, 514 U.S. at 714 (opinion of Stevens, J.) (internal quotation marks and citation omitted). Even in *Apprendi*, this Court was "[c]onscious of the likelihood that legislative decisions may have been made in reliance on *McMillan*," 530 U.S. at 487 n.13, and it turns out that many were. Not only did the *Harris* majority recognize that Section 924(c)(1)(A) was itself enacted in reliance on *McMillan*, 536 U.S. at 556, but the plurality observed that "[l]egislatures and their constituents have relied upon *McMillan* to exercise control over sentencing through dozens of statutes like the one the Court approved in that case," *id.* at 567; see *id.* at 568 (plurality opinion) (citing, as examples, Ala. Code § 13A-5-6(a)(4) (1994); Kan. Stat. Ann. § 21-4618 (1995); Minn. Stat. Ann. § 609.11 (Supp. 2002); N.J. Stat. Ann. § 2C:43-6(c) and (d) (1998); 42 Pa. Cons. Stat. § 9717(a) (1998); Ill. Comp. Stat. § 5/5-5-3(c)(2)(D) (2000); Alaska Stat. § 12.55.125(b) (2000); Md. Ann. Code, art. 27, § 286 (Supp. 2000)); see *id.* at 570 (Breyer, J., concurring in part and concurring in the judgment) (recognizing that "[d]uring the past two decades, * * * mandatory minimum sentencing statutes have proliferated in number and importance").

Since 2002, Congress and state legislatures have continued to enact new mandatory minimum sentences against a constitutional backdrop that now includes not

only *McMillan*, but also *Harris*. See, *e.g.*, Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 208, 120 Stat. 615 (codified as amended at 18 U.S.C. 1591(b)(1)-(2) (2006 & Supp. V 2011)); Prevention of Terrorist Access to Destructive Weapons Act of 2004, Pub. L. No. 108-458, Tit. VI, Subtit. J, § 6904(b), 118 Stat. 3771 (codified at 42 U.S.C. 2272(b)); Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003 (PROTECT Act), Pub. L. No. 108-21, Tit. I, § 104(b), 117 Stat. 653 (codified at 18 U.S.C. 1201(g)); 2011 Ala. Acts 621 (codified at Ala. Code § 32-5A-191(i) and (j) (LexisNexis 2012 Supp.)) (includes misdemeanors); 2008 Ariz. Sess. Laws 1252 (codified at Ariz. Rev. Stat. Ann. § 28-1382(D)(1) (2012)) (misdemeanor); 2007 Conn. Acts 444 (Reg. Sess.) (codified at Conn. Gen. Stat. Ann. § 53-21(a) (West 2007)); 2004 Ga. Laws 1071 (codified as amended at Ga. Code Ann. § 16-13-31.1 (2011)); 2005 Nev. Stat. 87 (codified at Nev. Rev. Stat. 200.463(2) (LexisNexis 2012)); 2010 Wyo. Sess. Laws 540 (codified at Wyo. Stat. Ann. § 6-2-314 (2011)); see also *Rogers* v. *Cota*, 219 P.3d 254, 257 (Ariz. Ct. App. 2009) (concluding that above-cited Arizona statute authorizes judicial factfinding); *State* v. *Clarke*, 134 P.3d 188, 193-194 (Wash. 2006) (concluding that judicial factfinding can increase a defendant's minimum sentence), cert. denied, 552 U.S. 885 (2007); *Commonwealth* v. *Kleinicke*, 895 A.2d 562, 570-574 (Pa. Super. Ct. 2006) (concluding that Pennsylvania mandatory minimums, which "serve only to limit the sentencing court's discretion," are consistent with this Court's *Apprendi* line of cases).

It would be even more disruptive now than a decade ago to "overturn" such statutes or to "cast uncertainty upon the sentences imposed under them." *Harris*, 536

U.S. at 568 (plurality opinion). Although courts and prosecutors can adjust to charging and proving to the jury any fact that increases a mandatory minimum, the legislatures that enacted these statutes may have neither considered nor wanted the additional procedural complexities and altered power dynamics that such an approach would produce. See pp. 28-30, *supra*.

The legislative response to the effective invalidation of judicial factfinding for mandatory minimum statutes is not readily predictable. Depending on the breadth of the potential rationale for finding petitioner's sentence in this case to be unconstitutional, one legislative response might be to restructure provisions like Section 924(c)(1)(A) to provide a much higher default minimum sentence (*e.g.*, ten years), with mitigating factors (*e.g.*, that the defendant did *not* brandish a gun or did *not* discharge a gun) that allow for reductions (*e.g.*, five years or three years). See *Patterson*, 432 U.S. at 201-202 (concluding that State could require murder defendant to prove affirmative defense of extreme emotional disturbance); cf. 18 U.S.C. 3553(f) (safety-valve provision permitting certain defendants to avoid the application of mandatory minimum drug sentences). Another response might be to collapse graduated sentencing provisions like Section 924(c)(1)(A) into a single minimum sentence somewhere in the middle (say, six years for every defendant). Such changes in sentencing structure would have important practical consequences to the parties involved—particularly criminal defendants, who may or may not find themselves in a better position than they were before. The unpredictability of unsettling a quarter-century of constitutional jurisprudence in this area accordingly reinforces the soundness of adhering to

stare decisis, preserving *McMillan* and *Harris*, and declining to change the rules at this time.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * * * nor be deprived of life, liberty, or property, without due process of law.

2. The Sixth Amendment to the United States Constitution provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury of the State and district wherein the crime shall have been committed, * * * and to be informed of the nature and cause of the accusation.

3. 18 U.S.C. 924(c)(1) and (4) provides in pertinent part:

Penalties

* * * * *

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a fire-

arm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

* * * * *

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

REPLY BRIEF

No. 11-9335

In The Supreme Court of the United States

ALLEN RYAN ALLEYNE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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ARGUMENT

The Sixth Amendment requires that any fact that entitles the prosecution to a kind, degree, or range of punishment more severe than the judge would otherwise have discretion to impose must be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. This Court's decisions in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Harris v. United States*, 536 U.S. 545 (2002), violate this principle. Those decisions permit a judge to override the sentencing range prescribed by the jury, and they entitle the prosecution to a higher sentence based on facts it need not charge, prove to a jury, or establish beyond a reasonable doubt. As Mr. Alleyne has demonstrated, *McMillan* and *Harris* are inconsistent with a well-established understanding of the rights inherent in a fair trial, as recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *McMillan* and *Harris* were wrong when decided, and the Court should overrule them now.

I. THE GOVERNMENT'S CONSTITUTIONAL ARGUMENTS ARE UNAVAILING.

A. That Judges May Constitutionally Find Facts When Exercising Discretion Within A Range Established By The Jury's Verdict Does Not Permit Judges To Find Facts That Mandate A Different Range.

For the truism that judges may consider facts when exercising discretion within a permissible

range, the government relies on *Williams v. New York*, 337 U.S. 241 (1949), as well as on passages in *Apprendi* and Bishop's treatise. U.S. Br. 25-26. But each of these sources states the corresponding limitation that judges may not find facts that alter the limits of the permissible range. *See Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) ("[O]ur periodic recognition of judges' broad discretion in sentencing . . . has been regularly accompanied by the qualification that that discretion was bound by the range of sentencing options prescribed by the legislature."); *see also Williams*, 337 U.S. at 246 (noting that judge has "wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed *within the limits fixed by law*") (emphasis added); *id.* at 251 & n.16; 1 Joel Prentiss Bishop, Commentaries on the Law of Criminal Procedure §85, at 54 (2d ed. 1872).

This Court has expressly rejected the notion that what goes for facts *without* a binding effect supports the constitutionality of judicial factfinding giving rise to a *mandatory* sentencing range. *Blakely v. Washington* rejected the State's analogy of its presumptive guidelines system to the "indeterminate-sentencing regime upheld in *Williams*." 542 U.S. 296, 305 (2004). The Court likewise distinguished *Williams* in *United States v. Booker*, and emphasized the fundamental difference, for constitutional purposes, between judicial factfinding in the course of exercising discretion within a statutory sentencing range and judicial factfinding *mandating* a more severe range. *See* 543 U.S.

220, 233-35 (2005) (holding that the "Guidelines as written" violated Sixth Amendment because they "are not advisory; they are mandatory and binding on all judges," requiring judges to "'impose a sentence of the kind, and within the range' established by the Guidelines"). The Court explained that "new sentencing practice[s]," *i.e.*, mandatory minimums and mandatory guidelines, required it to address "how the right of jury trial could be preserved, in a meaningful way guaranteeing that the jury would still stand between the individual and the power of the government under the new sentencing regime." *Id.* at 236-37.

In this case, the prosecutor attempted, but failed, to prove brandishing to the jury beyond a reasonable doubt; by a mere preponderance, he then satisfied the judge of that same fact at sentencing. That factfinding compelled—not merely permitted—the judge to impose a sentence two years longer than the lowest sentence authorized by law based on the jury's verdict alone. To support its contention that this does not violate *Apprendi*'s rule, the government simply denies that this judicial factfinding altered the range. According to the government, because mandatory-minimum statutes set "minimum sentences within the sentencing range otherwise specified," and because judges may permissibly decide in their own discretion to impose a sentence of seven years based on a finding of brandishing, it must be constitutional for Congress to require all judges to impose that sentence. U.S. Br. 27-28. The government's own statement demonstrates its error: precisely because

the minimum *is* mandatory, the finding *deprives* the judge of discretion to impose any sentence less than seven years, and the factfinding therefore *does* increase the punishment to which the prosecution is legally entitled.

Because, upon a finding of brandishing, "the absolute statutory limits of [the] punishment change, constituting an increased penalty," the "defendant must be afforded the procedural protections of notice, a jury trial, and a heightened standard of proof." *Harris*, 536 U.S. at 580 (Thomas, J., dissenting) (citing *Apprendi*, 530 U.S. at 490; *Jones v. United States*, 526 U.S. 227, 253 (1999)). This Court should now hold "that any fact mandating the imposition of a sentence more severe than a judge would otherwise have discretion to impose" must be charged in an indictment and proved to a jury beyond a reasonable doubt. *United States v. O'Brien*, 130 S. Ct. 2169, 2183 (2010) (Stevens, J., concurring).

B. *Apprendi*'s Rule Is Not Limited To Its Narrowest Holding.

Apprendi made clear that, whenever a statute "annexes a higher degree of punishment" based on a certain fact, that fact must be charged in the indictment and proved to the jury beyond a reasonable doubt. 530 U.S. at 480. In other words, any fact that alters "the kind, degree, or range of punishment to which the prosecution is by law entitled" must be pled

and proved to a jury. 530 U.S. at 501 (Thomas, J., concurring).

Judicial factfinding violates the Sixth Amendment when it establishes a mandatory range different from that prescribed by the jury's verdict alone, even if the sentence falls below the statutory maximum. The range within which a court may sentence is the one authorized by the jury's verdict; the judge may not override the jury's authorization and select a more severe range. *See Apprendi*, 530 U.S. at 483 n.10 ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment and found by the jury."). In this case, the jury's verdict authorized a range beginning at five years' imprisonment; *Harris* permitted the district judge to reject that "outer limit" and to increase the bottom of the range to seven years' imprisonment. *See Harris*, 536 U.S. at 577 (Thomas, J., dissenting).

The government attempts to evade the import of *Apprendi* by denying the case's holding. It acknowledges that *Apprendi* held that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." U.S. Br. 33; *Apprendi*, 530 U.S. at 490 (quoting *Jones*, 526 U.S. at 252 (Stevens, J., concurring)). But it claims that this rule is limited to increases above the statutory maximum. Mandatory minimums, however, were not before the Court in *Apprendi*, and thus the Court could not adopt its broader rule as a "holding" there. Still, its statement of the rule, which was

based on the "range" authorized by the jury's verdict, would have been superfluous if it was limited to statutory maximums, as the government contends. *Apprendi* expressly adopted its rule from Justice Stevens's concurrence in *Jones*, which stated that the rule applied to mandatory minimums. *Apprendi*, 530 U.S. at 490; *Jones*, 526 U.S. at 253 (Stevens, J., concurring). Any doubt that *Apprendi* did not limit its rule to increases above the statutory maximum is resolved by the majority's acknowledgment of the conflict and the dissent's warning that *McMillan* could not survive. 530 U.S. at 487 n.13; *id.* at 533 (O'Connor, J., dissenting).

C. Permitting Judges To Find Facts, By A Preponderance Of The Evidence, That Compel Sentences Higher Than Permitted By The Jury's Verdict Denies Defendants The Bedrock Elements Of A Fair Trial.

The government's account of the jury-trial right as protecting only against expansion of judicial power, and only by finding facts that increase the maximum sentence, is too narrow. U.S. Br. 8, 25, 35-37.

The Framers well understood that trial by jury protects against oppression by all branches of government, including oppressive executive power that may go unchecked by judges. *See* 3 The Records of the Federal Convention of 1787, at 101 (Max Farrand ed. 1911) (James Wilson) ("[T]he oppression of government is effectually barred, by declaring that in all

criminal cases, the trial by jury shall be preserved."); *see also* 4 William Blackstone, Commentaries on the Laws of England 342-43 (1769) (jury trial is "the grand bulwark" between "the liberties of the people and the prerogative of the crown," protecting the accused from the "dangerous and destructive" "executive power of the laws" that may be "exerted without check or control" by judges "named by the crown"); Pet. Br. 30-31. Thus, when the prosecutor chose whether to charge the value of the goods necessary for conviction and a mandatory death penalty for non-clergyable larceny—and thus possessed exclusive power to eliminate judicial discretion to impose a lesser punishment, *see* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. Chi. L. Rev. 1, 22, 40-41, 47-54 (1983)—the jury acted as a check against executive power, not judicial power. This Court has recognized that "the essential feature of a jury obviously lies in [its] interposition between the accused and his *accuser*." *Williams v. Florida*, 399 U.S. 78, 100 (1970) (emphasis added).[1]

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[1] This Court has long recognized that the Framers intended the jury trial as a check against all branches of government, including the executive. *See Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (jury trial right provides "an inestimable safeguard against the corrupt or overzealous prosecutor," "unchecked power," and "arbitrary law enforcement"); *Singer v. United States*, 380 U.S. 24, 31 (1965) ("The [jury trial] clause was clearly intended to protect the accused from oppression by the Government. . . ."); (Continued on following page)

"The founders of the American Republic were not prepared to leave [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the Bill of Rights." *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring). Just like mandatory minimums today, fixed punishments at the time of the founding entitled the prosecution by law to a particular sentence. Juries "indirectly checked" the power of Parliament and Crown to inflict these punishments through their power to acquit or find lesser offenses. *Jones*, 526 U.S. at 245. "That this history had to be in the minds of the Framers is beyond cavil." *Id.* at 247.

As demonstrated by this case, when the judge, at the request of the prosecutor, finds by only a preponderance of the evidence a fact the jury declined to find beyond a reasonable doubt, and is then compelled to impose a sentence higher than that to which the prosecutor was legally entitled based on the jury's verdict alone, both judicial and prosecutorial power are expanded at the expense of the jury and the accused person it was meant to protect. The government attempts to turn this result to its benefit, claiming that mandatory minimums do not undermine the jury-trial right's protection against overzealous prosecutors or harsh judges because the judge is free under the Sentencing Guidelines' "relevant

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Jones, 526 U.S. at 245 (Framers must have had in mind the jury's "power to thwart Parliament and Crown").

conduct" rules, as construed in *United States v. Watts*, 519 U.S. 148 (1997), to find a fact by a preponderance of the evidence, even when the jury rejected that fact under the reasonable-doubt standard. U.S. Br. 27. As this Court later recognized, however, *Watts* did not address the Sixth Amendment problem. *See Booker*, 543 U.S. at 240 & n.4. And, as noted above, this Court has since rejected the basis upon which *Watts was* decided, *i.e.*, that *Williams* permits a judge to find facts with a determinate effect. *Compare Watts*, 519 U.S. at 151-52, *with Blakely*, 542 U.S. at 305, *and Booker*, 543 U.S. at 233-34. Thus, while the use of acquitted conduct under the advisory Guidelines may or may not violate the Sixth Amendment, the use of acquitted conduct to impose a mandatory minimum squarely presents the Sixth Amendment problem.

Those who wrote the Constitution intended that "[i]f the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Duncan*, 391 U.S. at 156. They surely would not have abided the judge at the behest of the prosecutor taking away the jury's judgment.

Further, the harm here is not only that the jury's judgment was taken away, but also that it was replaced by a finding under a lesser standard, for the right to proof beyond a reasonable doubt is "the companion right" to the right to jury trial. *Apprendi*, 530 U.S. at 478; *see also Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) ("[T]he jury verdict required by the

Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt."). The government's argument that proof of a mandatory-minimum fact by a preponderance of the evidence does not undermine the values underlying the reasonable-doubt standard rests on the same implausible assertion that the sentence is "guided" by a mandatory minimum rather than "solely" by the judge's discretion; thus, it says, there is no increase in loss of liberty or stigma. *See* U.S. Br. 37-38. *Apprendi* made clear, however, in adopting the position of the dissent in *McMillan*, that, "[i]f a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened," and those circumstances thus must be proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 484; *see also McMillan*, 477 U.S. at 103 (Stevens, J., dissenting); *id.* at 94 (Marshall, J., dissenting); *Harris*, 536 U.S. at 581 (Thomas, J., dissenting). "*Winship*'s due process and associated jury protections extend, to some degree . . . 'simply to the length of [the] sentence.'" *Apprendi*, 530 U.S. at 484 (internal citation omitted); *see also Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975).[3]

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[3] Additionally, like the jury-trial right, the right to indictment was intended "as a protection against arbitrary rule." *Duncan*, 391 U.S. at 151 (noting that indictment and jury trial are a "two-fold barrier . . . between the liberties of the people and the prerogatives of the crown") (citation omitted). The government's argument that an indictment that does not allege a

(Continued on following page)

D. The Contentions Of The Government And Its *Amici* Regarding History Are Incorrect.

The government mistakenly claims that *McMillan* and *Harris* should be upheld because statutes precisely like 18 U.S.C. §924(c) were not in widespread use until the twentieth century. U.S. Br. 42. This Court looks to how the Framers would have regarded such laws, no matter how "peculiar . . . to our time and place," *Jones*, 526 U.S. at 244, 248, and seeks to "preserv[e] an ancient guarantee under [the] new set of circumstances," *Booker*, 543 U.S. at 237. In any event, the government and its *amici* fail to refute the fact that there were close analogues from the time of the founding where facts that precluded a more lenient sentence, even when they did not increase the available maximum, were required to be charged in an indictment and proved to the jury. And contrary to their claims, throughout the late eighteenth and

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mandatory-minimum fact fulfills the functions of providing notice and enabling defendants to plead double jeopardy because effective counsel, or the judge pursuant to Fed. R. Crim. P. 11(b)(1)(I), will inform them of any mandatory minimum before they elect trial or a guilty plea is inexplicable. U.S. Br. 38. The constitutional right to indictment is not fulfilled by defense counsel advising her client or a judge complying with Rule 11. Rule 11 is, however, instructive. *See* Fed. R. Crim. P. 11, advisory committee note (1974) (explaining that the "objective" of requiring the judge to inform the defendant of "any mandatory minimum penalty" is "to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose").

early-to-late nineteenth centuries, all facts that *increased* the punishment, whether the minimum, the maximum, or both, were required to be charged and proved to a jury.

1. When statutes required definite and harsher punishment for a common law misdemeanor than the judge could otherwise impose in his discretion if committed under certain circumstances specified in the statute, those circumstances had to be precisely charged in the indictment and proved to the jury, although the judge could have imposed the same sentence in his discretion for any reason for the common law offense. *See* FAMM Br. 8-16. This is evidence that *Harris* is inconsistent with the understanding of the founding generation. The government responds without addressing the point. *See* U.S. Br. 43.

The government's *amici* claim that the question to be decided is whether a "sentencing factor that does not purport to define a substantive criminal offense must nevertheless be treated as an 'element' of a crime for constitutional purposes." Br. of Texas, *et al.* 24 (hereinafter "States Br."). But *Apprendi* rejected that distinction for constitutional purposes, leaving *amici* with no effective answer.

2. In response to the example of clergy-stripping statutes, the necessary facts for which had to be charged in an indictment and proved to the jury, FAMM Br. 16-22, the government argues that because benefit-of-clergy operated as a post-judgment stay of the death sentence, it was "distinct from a

substantive sentencing statute prescribing a mandatory minimum within a statutory range." U.S. Br. 47. If anything, a statute that merely took away a post-judgment remedy should be less likely to require specific factual allegations in the indictment and proof to the jury than a statute that affected the sentence more directly. Yet if the jury declined to find the necessary facts, the clergy-stripping statute could not apply. *See* Langbein, *supra*, at 22, 23 n.79; *see also Jones*, 526 U.S. at 245.

Amici's argument that because it was rare "[i]n practice" for judges to deny benefit-of-clergy, facts ousting a case from clergy "should . . . be viewed as boosting the maximum allowable punishment" further undermines *Harris*. States Br. 25-26. In practice, mandatory minimums increase the punishment defendants receive. *See Harris*, 536 U.S. at 577-78 (Thomas, J., dissenting); NACDL/NAFD Br. 24-25. Thus, contrary to the *Harris* plurality's conclusion that "a factual finding's practical effect cannot . . . control the constitutional analysis," 536 U.S. at 566, both the historical examples and the issue here involve a particular finding of fact with a critical effect on real sentences, though in theory not exposing the defendant to greater punishment than the judge could (but seldom would) have imposed.

3. The government is wrong that nineteenth-century courts would not have required facts that carried a higher minimum but not a higher maximum sentence to be proved to the jury. U.S. Br. 48-51. For example, as this Court recognized more than a

century ago, it "was for the jury to say" whether the defendant had committed first or second degree burglary, *Moore v. Missouri*, 159 U.S. 673, 678-79 (1895), the former subject to imprisonment from ten years to life, the latter from three years to life, 1 Mo. Rev. Stat. §§3528, 3955 (1889).[3]

In each of the cases the government cites for its suggestion that judges, rather than juries, determined the degree of crime, U.S. Br. 50, and in many others, the statute required the jury to expressly designate the degree of crime in its verdict (unless the defendant waived his right to jury by confessing to murder in open court[4]), even though these statutes did not create separate crimes and the finding of the degree only *lessened* the punishment for the crime charged. *See People v. Noll*, 20 Cal. 164 (1862); *Wicks v. Commonwealth*, 2 Va. Cas. 387 (1824); *People v. Jefferson*, 52 Cal. 452 (1877); *see also, e.g.*, *White v. Commonwealth*, 6 Binn. 179, 182-83 (Pa. 1813); *Weighorst v. State*, 7 Md. 442 (1855); *State v. Verrill*, 54 Me. 408, 415-16 (1867). If the jury did not expressly determine the degree, the court was wholly unauthorized to do so or to assume that the jury had found

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[3] The government is also wrong about the New York recidivist cases. U.S. Br. 50-51; *see People v. Sickles*, 156 N.Y. 541, 544-47 (1898) (explaining *People v. Raymond*, 96 N.Y. 38 (1884)).

[4] A defendant is entitled to waive his right to jury trial. *See People v. Chew Lan Ong*, 141 Cal. 550, 552 (1904) (relying on *Hallinger v. Davis*, 146 U.S. 314 (1892)); *accord Duncan*, 391 U.S. at 158.

the higher degree of murder.[5] In Pennsylvania, where these statutes originated, the Supreme Court held that it would be an "infringement of the right of trial by jury" to presume first degree murder when the jury did not specify the degree. *Johnson v. Commonwealth*, 24 Pa. 386, 390 (1855) (nullifying death sentence and instructing to impose sentence for second degree murder).

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[5] *E.g.*, *People v. Campbell*, 40 Cal. 129, 139 (1870) (reversing death sentence where verdict found defendant "guilty of the crime charged"); *People v. Marquis*, 15 Cal. 38 (1860) (where verdict on indictment "in the usual form" was "guilty, as charged," court could not assume jury fixed grade); *Ford v. State*, 12 Md. 514, 542-49 (1859) (general verdict on indictment charging murder insufficient to establish first degree); *Hogan v. State*, 30 Wis. 428 (1872) (court unauthorized to impose punishment for second degree where verdict did not specify degree as second or third); *State v. Dick*, 3 Ohio St. 89 (1853) (ordering new trial where jury did not specify degree of homicide); *State v. Moran*, 7 Iowa 236 (1858) (court unauthorized to assume verdict was for first degree murder); *State v. Dowd*, 19 Conn. 388, 393 (1849) ("[G]eneral conviction, upon any indictment, without such determination, would not authorise a court to impose the greater punishment."). *Amici*'s related contention that the decisions allowed "indictments to sustain convictions for any degree of murder, even if higher than the degree specified in the indictment" is thus wrong. *See* States Br. 10. The only two decisions cited for this proposition said so in theory but did not so hold. *See Territory v. Stears*, 2 Mont. 324, 325 (1875) (reversing death sentence where indictment charged first degree murder and jury found "guilty . . . as charged in the indictment"); *People v. Nichol*, 34 Cal. 211, 217 (1867). And contrary to *amici*'s contention that these cases created some sort of "real-offense" sentencing, States Br. 11, 18, in no instance was the judge permitted to impose a greater punishment than that for the crime of conviction, and the degree, found by the jury.

As the author of the States' *amicus* brief has elsewhere written, it was "the unanimous view among the states that juries should fix the degree of murder in cases that went to trial," and this "is at least persuasive evidence of what the right of jury trial meant in the early years of our nation's history." Jonathan F. Mitchell, Apprendi's *Domain*, 2006 Sup. Ct. Rev. 297, 342.

4. *Amici* not only misconstrue the nineteenth-century cases holding that the degree of murder was not required to be charged in the indictment, but openly disagree with *Apprendi*'s historical claims. States Br. 5-6. Contrary to *amici*'s claims and consistent with the Court's historical account, *see Apprendi*, 530 U.S. at 480-81; *id.* at 501 (Thomas, J., concurring), the statutes to which *amici* refer neither created a new crime nor affixed a greater punishment to it. As the result of efforts since before independence to limit the death penalty to "willful, deliberate and premeditated" killing, *see* Edwin R. Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. Pa. L. Rev. 759, 771 (1949), Pennsylvania authorized the jury to find a lower degree of murder to which a *lesser* punishment attached. *See* Pa. Act of April 22, 1794 ("An act for the better preventing of crimes, and for abolishing the punishment of death in certain cases"); *id.* §4 (setting punishment for second degree murder at five to eighteen years in prison). Other states followed suit.

The courts held that an indictment charging murder "with malice aforethought" need not specify that the offense was "deliberately premeditated" before the jury could find first degree murder, not because the prosecutor was not required to charge all essential facts, but because the common law charge of "murder" with "malice aforethought" necessarily charged "every shade or degree of the crime." *Green v. Commonwealth*, 12 Allen 155, 170-71 (Mass. 1866); *accord White*, 6 Binn. at 182-83 (the statute "does [not] alter the punishment" for the "known offence" of murder "so far as concerns murder in the first degree"). Indeed, it was only by interpreting "malice aforethought" as necessarily encompassing "deliberate premeditation" that an indictment not specifying the latter could constitutionally permit a finding of first degree murder. *See Green*, 12 Allen at 171; *Hogan*, 30 Wis. at 440. The new statutory divisions authorized the jury to mitigate the mandatory death penalty for murder by finding malice without premeditation, and thus second degree murder, just like any other lesser included offense, *e.g.*, *Dowd*, 19 Conn. at 392-93; *State v. Millain*, 3 Nev. 409, 442 (1867); *Moore*, 159 U.S. at 678-79 (burglary). This emulated manslaughter and other clergyable offenses at common law. *See* 4 Blackstone, *supra*, at 362-64.

In sum, contrary to *amici*'s characterization, States Br. 6-8, the murder statutes did not *increase* the punishment *to* death for first degree murder *from* imprisonment for second degree murder, which did not exist at common law and was not treated as a

new crime under the statute. They *decreased* the punishment *from* death for all common-law homicide (unless "malice aforethought" was not alleged or proved, in which case it was manslaughter and subject to benefit-of-clergy, 2 Matthew Hale, History of the Pleas of the Crown 170) *to* a lesser punishment for murder that was not premeditated. Though Bishop disagreed with the holdings that the statutory divisions did not create new offenses or alter the punishment for murder, 3 Joel Prentiss Bishop, New Criminal Procedure §§573-574, 585 (1913), the practice was fully consistent with the undisputed rule that required prosecutors to charge any "peculiar circumstances not necessarily included in the original [common law] offence" that "add[] to or alter[] the punishment." 1 Francis Wharton, A Treatise on the Criminal Law of the United States §371 (7th ed. 1874); 1 Bishop, Commentaries, *supra*, §598. In Michigan, where the punishment for first degree murder was life and for second degree murder was any term of years to life, Mich. Rev. Stat., tit. III, ch. 153, §§1, 2 (1846), the jury was required to find the degree of murder, *id.* §3. Thus, the early statutes always required that a jury find the degree that dictated the punishment the judge was permitted to impose, whether minimum, maximum, or both.

E. The Hypothetical Policy Reasons For Mandatory Minimums Offered By The Government Are Both Irrelevant And Misguided.

The government's policy reasons for insulating mandatory minimums from *Apprendi*'s rule cannot withstand scrutiny. U.S. Br. 25, 27, 28-30. The government fails to name a single mandatory minimum based on acts that "might" emerge at sentencing, because there is none. The notion that requiring mandatory-minimum facts to be proved to a jury unfairly forces defendants to make inconsistent arguments before the jury is unfounded, and is belied by the fact that complaints of this alleged problem are not heard in the numerous districts where drug quantity is charged and submitted to the jury. *See* Sentencing Project/ACLU Br. 5, 14-18, 30-31, 32.

The government's suggestion that Congress might not want to give "too much power" to prosecutors ignores reality. Plea bargaining takes place in the shadow of what the factfinder and sentencer are expected to do in light of relevant structural constraints. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2483-84 (2004). When a fact triggering a mandatory minimum need only be proved to a judge by a preponderance of the evidence derived from "bureaucratically prepared, hearsay-riddled presentence reports," *Booker*, 543 U.S. at 304 (Scalia, J., dissenting in part), or, as here, when the jury rejected that fact, and the judge has no choice but to impose the resulting sentence,

prosecutors plainly have more power than when the fact must be charged and proved to a jury beyond a reasonable doubt. *See United States v. Dossie*, 851 F. Supp. 2d 478, 485 (E.D.N.Y. 2012) (Gleeson, J.) ("[T]here is no fairness in a system that allows" the government to "simply dictat[e] a five-year sentence without having to allege, let alone prove, the aggravating fact[.]"). Allowing prosecutors to omit mandatory-minimum facts from the indictment and prove them at sentencing by a mere preponderance gives them more power to determine sentences, not less.

The government's claim that allowing prosecutors to obtain mandatory-minimum sentences based on a mere preponderance of the evidence might create "sentencing consistency," U.S. Br. 29, is refuted by the evidence that prosecutors' use of mandatory minimums creates unwarranted racial disparity. *See* Sentencing Project/ACLU Br. 27-30; Paul J. Hofer, *Review of U.S. Sentencing Commission's Report to Congress: Mandatory Minimum Penalties in the Criminal Justice System*, 24 Fed. Sent'g Rep. 193, 198 (2012); U.S. Sentencing Comm'n, *Mandatory Minimum Penalties in the Criminal Justice System* 257-58, 359-60, 363-64 (2011). In sum, even if relevant to the constitutional issue, the government's policy arguments counsel for, not against, applying *Apprendi* to mandatory minimums.

F. *Stare Decisis* Does Not Justify Upholding *Harris*.

The government's last redoubt is that this Court should sustain *Harris* on the basis of *stare decisis*. U.S. Br. 51-55; *see* States Br. 27-29. The essence of this argument is that even if *Harris* is wrong, it should still be the law. But if *Harris* is wrong—and it is—this Court should not hesitate to say so.

The government erroneously assigns precedential value to the result in *Harris* rather than to its reasoning. Although five Justices voted to uphold *McMillan*, only four believed that *McMillan* was compatible with *Apprendi*. In similar circumstances, the Court stated that a "decision has, since its issuance, been of questionable precedential value, largely because a majority of the Court expressly disagreed with the rationale of the plurality." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996). Here, as in *Seminole Tribe*, the prior constitutional ruling was "a departure from established law" that was "unworkable" and "badly reasoned." *Id.* at 63 (citations omitted). As in that case, the force of *stare decisis* here is minimal to nonexistent.[6]

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[6] There is no support whatsoever for *amici*'s suggestion that *stare decisis* has greater weight here because *Harris* was "a precedent on whether or not to revisit a precedent." States Br. 28 (alteration and citation omitted). A majority of the Court expressly declined to re-affirm *McMillan*'s reasoning.

The government's reliance argument should also be rejected. U.S. Br. 52-53. Congressional enactment of mandatory minimums implies nothing about whether the triggering facts should be charged and proved to a jury, and Congress has expressed no view on the subject. Indeed, in *O'Brien*, this Court found that Congress intended the factfinder to be the jury, at least as to §924(c)(1)(B). 130 S. Ct. at 2180.

Further, hypothetical legislative responses to a decision overruling *Harris* are not this Court's concern. *Cf.* U.S. Br. 54. Any legislation would be subject to this Court's repeated warnings that lawmakers cannot employ creative drafting to evade the Sixth Amendment. *See, e.g.*, *Apprendi*, 530 U.S. at 484-85; *Mullaney*, 421 U.S. at 697-98. Nor is the validity of any other precedent before the Court in this case, and the rule Mr. Alleyne seeks would not require overruling anything other than *McMillan* and *Harris*.[7]

Finally, the government lists a number of state and federal statutes containing mandatory-minimum sentencing provisions, and raises concerns about the practical effect of overruling *Harris*. U.S. Br. 53. The government's *amici* do not express any such concerns,

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[7] In particular, the government's reliance on *Oregon v. Ice*, 555 U.S. 160 (2009), is misplaced. U.S. Br. 41. *Ice* is readily distinguishable because it involved multiple counts of conviction instead of the single §924(c) count here. In addition, *Ice*'s reliance on the historical tradition of judges deciding whether to impose consecutive or concurrent sentences augurs in Mr. Alleyne's favor. *See* Part I.D., *supra*.

however. In any event, overruling *Harris* would not prevent legislatures from enacting mandatory minimums.[8] As in *Harris*, the government admits that "courts and prosecutors can adjust to charging and proving to the jury any fact that increases a mandatory minimum." U.S. Br. 54. Charging brandishing in an indictment—as the government did here—and proving it to a jury will cause no more practical difficulty than charging and proving that a firearm was a machinegun.

II. THE COURT MAY CONSIDER THE STATUTORY ARGUMENTS.

The government's suggestion that this Court should not consider Mr. Alleyne's statutory arguments, U.S. Br. 13-14, 21, is not persuasive. The statutory arguments are fairly included within the

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[8] While pointing to *Harris*'s citation to several state laws with mandatory minimums, U.S. Br. 52 (citing *Harris*, 536 U.S. at 567), the government fails to note that at least two of these statutes have since been overturned, either by court decision or legislative enactment. *See State v. Allen*, 153 P.3d 488, 492-93 (Kan. 2007); Minn. Stat. Ann. §244.10, subdiv. 5 (West 2008). To the extent they do not already require jury findings on facts leading to mandatory minimums, *see* Mo. Ann. Stat. §566.030(2); *State v. Cunningham*, 840 S.W.2d 252 (Mo. Ct. App. 1992); *Weeks v. State*, 785 S.W.2d 331 (Mo. Ct. App. 1990), state courts and legislatures are perfectly capable of adjusting to a decision overruling *Harris*, as they did after *Blakely*, *see* Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 Cardozo L. Rev. 775, app. A, tbls. II, IV (2008). The government's *amici* do not contend otherwise.

question presented, *see* S. Ct. R. 14.1, which is whether *Harris* should be overruled. The *Harris* plurality opinion included both a constitutional and a statutory conclusion. "The petitioner can generally frame the question as broadly or as narrowly as he sees fit," *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992), and this Court granted certiorari on the broad question of *Harris*'s continuing validity. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534. Either for reasons of constitutional avoidance or judicial efficiency, this Court often treats statutory construction as antecedent to constitutional analysis. *See Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 56 (2006).

Further, the government has urged this Court to hold two petitions raising the fixed-term argument pending the decision in this case. U.S. Br. in Opp., *Lucas v. United States*, at 10 n.2 (No. 11-1536); U.S. Br. in Opp., *Dorsey v. United States*, at 12 (No. 12-6571); *see also Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980) (considering, in "the interests of judicial administration," an issue not raised below that was "squarely presented and fully briefed" and "is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case"). In sum, although the Court should overrule *Harris* on constitutional grounds, no

impediment prevents consideration of Mr. Alleyne's statutory arguments.

CONCLUSION

For the reasons stated above and previously, this Court should reverse the judgment below.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-9335

NOV 2 5

IN THE

Supreme Court of the United States

ALLEN RYAN ALLEYNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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INTEREST OF *AMICUS CURIAE*

The Center on the Administration of Criminal Law ("Center") is dedicated to defining good government and prosecution practices in criminal justice matters through academic research, litigation, and participation in the formulation of public policy. The Center's litigation practice aims to use the Center's empirical research and experience to assist courts in important criminal justice cases, and files briefs in support of both the Government and defendants in criminal matters. As the Center's name suggests, it is devoted to improving the quality of the administration of criminal justice and advocating the adoption of best practices through its scholarly, litigation, and public policy components. The Center's focus on government practices in criminal cases and on the exercise of prosecutorial power and discretion, its research-based approach, and its diversity of work make it the first and only organization of its kind.

SUMMARY OF ARGUMENT

One of the cornerstones of American law is that the "Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged." *United States v. Gaudin*, 515 U.S. 506, 511 (1995).

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[1] The parties have consented to the submission of this brief, and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office. Pursuant to Supreme Court Rule 37.6, none of the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation or submission of this brief.

And this Court has long held that the Constitution protects a defendant "against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970).

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court affirmed that these basic principles meant that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed . . . . [and] that such facts must be established by proof beyond a reasonable doubt." *Id.* at 490 (quotation marks omitted). As a majority of the Members of this Court concluded in *Harris v. United States*, 536 U.S. 545 (2002), there is no constitutionally supportable reason for exempting those facts that require the application of a statutory mandatory minimum from this foundational rule.

Nevertheless, *Harris* preserved a Sixth Amendment loophole for facts that increase the mandatory minimum sentence. As Petitioner rightly argues, *Harris* is, and always has been, fundamentally inconsistent with *Apprendi*. But, in light of the express contingencies in Justice Breyer's controlling concurrence, this Court need not overrule *Harris* to recognize that it is no longer good law.

In 2002, when *Harris* was decided, *Apprendi* was still new and its scope, effect on mandatory guidelines regimes, and even its viability remained uncertain. The result was a fractured Court and a controlling concurrence that exempted mandatory

minimums from Sixth Amendment protections contingent on rolling back *Apprendi* and preserving the federal Sentencing Guidelines. Five Members of this Court accordingly recognized that the rules in *Harris* and *Apprendi* could not coexist for long.

In the ten years since *Harris* was decided, the contingent premises on which Justice Breyer's concurrence depended are no longer viable: *Apprendi* has been strengthened and expanded, while Federal and state mandatory sentencing guideline regimes have been struck down and reformed. Meanwhile, the *Harris* plurality's reasoning has been undermined. All that remains is for this Court to make explicit the import of these decisions: that *Harris* is no longer good law.

Making clear that *Harris* is no longer a viable precedent would bring doctrinal consistency to the Court's Sixth Amendment cases and improve federal sentencing. Nearly every court and commentator to have considered the matter has concluded that a regime that mandates the imposition of statutory minimum prison terms based on judicial factfinding under a preponderance standard of proof is neither principled nor wise. Preserving a loophole that allows circumvention of the jury right and the traditional criminal standard of proof to secure a mandatory minimum sentence incentivizes legislatures and prosecutors to rely heavily on mandatory minimums—a result that undermines the goals of proportionality and fairness that modern structured sentencing reforms are meant to achieve.

In this case, the Government claims that it is entitled to an increased mandatory sentence because, under a preponderance standard of proof, it persuaded the sentencing judge of a fact that it did not prove to a jury beyond a reasonable doubt. But the Sixth Amendment gives criminal defendants like Petitioner Alleyne the right to have a jury find any fact that, as a matter of law, is necessary to increase his sentence and to make that finding beyond a reasonable doubt.

ARGUMENT

I. *Apprendi* and its Progeny Require That All Facts That Increase a Defendant's Sentencing Range as a Matter of Law Must Be Found by the Jury or Admitted by the Defendant.

In its landmark decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that the Sixth Amendment requires any facts other than prior convictions that "increase the prescribed range of penalties to which a criminal defendant is exposed" to be assessed by the jury and established by proof beyond a reasonable doubt. 530 U.S. at 490 (internal quotation marks omitted). Over the past dozen years, this Court has steadily built upon *Apprendi*. *See, e.g.*, *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012) (applying *Apprendi* to the imposition of criminal fines); *Cunningham v. California*, 549 U.S. 270 (2007) (striking down California's determinate sentencing law); *Ring v. Arizona*, 536 U.S. 584 (2002) (applying *Apprendi* to aggravating factors required to impose the death penalty).

Most significantly, in *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the then-binding United States Sentencing Guidelines unconstitutionally abridged a defendant's Sixth Amendment right to trial by jury because the Guidelines regime denied defendants the right to have the jury find the facts that increased the binding range within which the judge was authorized to sentence. Relying on *Apprendi*, the Court explained that, while a "trial judge [may] exercise[] his discretion to select a specific sentence within a defined range," *Booker*, 543 U.S. at 233, any fact that, as a matter of law, was necessary to increase a defendant's sentence, even if below the statutory maximum, "must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Id.* at 244; *see also Apprendi*, 530 U.S. at 490; *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); *Cunningham*, 549 U.S. at 274-75.

Booker's treatment of facts that set *binding* sentencing ranges as constitutionally different from facts that set *advisory* ranges, or facts that are otherwise considered by the judge at his or her discretion in imposing a sentence, vindicates the historically important role of the jury. This Court has stressed the need "to give intelligible content to the right of jury trial" and the Framers' effort to ensure that the jury could and would "function as circuitbreaker in the State's machinery of justice." *Blakely*, 542 U.S. at 305-06. The right to a jury trial guarantees a community check not only against the "corrupt or overzealous prosecutor" and "the compliant, biased, or eccentric judge," *Duncan v.*

Louisiana, 391 U.S. 145, 156 (1968), but also against the broad and sometimes unfair rules of even a well-meaning legislature.[2]

The danger of legislative overreaching against which the jury is meant to guard is equally present with respect to criminal laws that trigger mandatory minimum sentences as with those laws that set mandatory maximums.[3] As a matter of constitutional logic, "the historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts," *Gaudin*, 515 U.S. at 513, applies just as strongly to facts that *require* a

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[2] *See, e.g.*, 2 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787*, at 94 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott Co. 1891) ("Let [a man] be considered as a criminal by the general government, yet only his fellow-citizens can convict him; they are his jury, and if they pronounce him innocent, not all the powers of Congress can hurt him.") (quoting Theophilus Parsons in the Massachusetts Convention of 1788); John H. Wigmore, *A Program for the Trial of Jury Trial*, 12 J. Am. Judicature Soc'y 166, 170 (1929) ("The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case."); Roscoe Pound, *Law in Books and Law in Action*, 44 Am. L. Rev. 12, 18 (1910) (praising the jury's power to correct overbroad laws in the name of justice as "the great corrective of law in its actual administration"); *see also United States v. Powell*, 469 U.S. 57, 65 (1984) (explaining "the jury's historic function, in criminal trials, as a check against arbitrary or oppressive exercises of power by the Executive Branch").

[3] *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 46-84, 106-16 (2003).

minimum sentence as it does to those facts that merely *authorize* a maximum sentence, *see Apprendi*, 530 U.S. at 563-64 (Breyer, J., dissenting). Indeed, for much of our Nation's history, facts that raised the required minimum also raised the authorized maximum, and courts treated those facts as offense elements without drawing any distinction based on the effect on the minimum or maximum. *See id.* at 522 (Thomas, J., concurring) (surveying cases).

This treatment makes sense, of course, because just like an increase in an authorized maximum, an increase in a "mandatory minimum entitl[es] the government to more than it would otherwise be entitled" in the absence of the law and consequently, "the change in the range available to the judge affects his choice of sentence." *Id.* (alteration in original) (internal quotation marks omitted). That becomes clear from an examination of this case, in which the mandatory minimum to which the Government claims entitlement increased Alleyne's § 924(c) sentence from 60 months to 84 months. This was so even though the jury was not persuaded Mr. Alleyne was guilty of the very same conduct the sentencing court found mandated an increased sentence as a matter of law. This Court's decisions in *Apprendi* and *Booker* make clear that the Constitution does not countenance such an end-run around the jury guarantee.

II. *McMillan* and *Harris* Are No Longer Good Law.

This is not the first case in which this Court has considered whether a defendant's right to trial by

jury attaches to facts that increase a binding minimum sentence. In *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the Court held that a legislature could entrust to judges the finding of facts necessary to require a mandatory minimum without seriously addressing the defendant's right to a trial by jury. And in *Harris v. United States*, 536 U.S. 545 (2002), the judgment upholding the exemption of mandatory minimums from the rule in *Apprendi* depended on Justice Breyer's contingent concurrence. That concurrence—together with the four-Justice dissent—established that the rule in *Harris* could stand only if *Apprendi* were rolled back and the mandatory federal Sentencing Guidelines were preserved. Of course, the opposite has happened: *Apprendi* has been expanded and the mandatory federal Sentencing Guidelines have been struck down. *See* Tr. of Oral Arg. at 20, *United States v. O'Brien*, 130 S. Ct. 2169 (2010) (No. 08-1569), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1569.pdf ("[A]t some point I guess I have to accept *Apprendi*, because it's the law and has been for some time.") (statement of Justice Breyer). Even the reasoning of the *Harris* plurality has been fatally undermined. By its own terms, *Harris* must now give way to *Apprendi*.

A. *McMillan* Did Not Address the Relationship Between Mandatory Minimums and the Right to Trial by Jury.

McMillan marked the Court's first encounter with what *Booker* later described as a "new trend in the legislative regulation of sentencing": legislative use

of so-called sentencing facts that "not only authorized, or even mandated, heavier sentences than would otherwise have been imposed, but increased the range of sentences possible for the underlying crime." 543 U.S. at 236. *McMillan* involved Pennsylvania's creation of a mandatory minimum sentencing enhancement that supplemented its existing indeterminate sentencing regime. The Court analyzed Pennsylvania's legislative innovation in light of the rough Due Process calculus that it discerned from *In re Winship*, 397 U.S. 358 (1970), *Mullaney v. Wilbur*, 421 U.S. 684 (1975), and *Patterson v. New York*, 432 U.S. 197 (1977), and "concluded that the Pennsylvania statute did not run afoul of [the Court's] previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of a criminal statute solely to avoid *Winship*'s strictures." *Apprendi*, 530 U.S. at 486 (citing *McMillan*, 477 U.S. at 86-88). *McMillan* explained that the Pennsylvania mandatory minimums "operate[d] solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it without the special finding of visible possession of a firearm." *McMillan*, 477 U.S. at 88. Having determined that Pennsylvania's treatment of the visible possession of a firearm as a sentencing factor did not fall on the wrong side of *Winship*'s Due Process divide, the Court disposed of petitioners' jury trial claim in a single paragraph, finding the claim "merit[ed] little discussion." *Id.* at 93.

The Court's later cases made clear that *McMillan* had not adequately addressed the jury question. In *Jones v. United States*, 526 U.S. 227, 242-44 (1999), this Court refused to treat the *Winship* Due Process analysis as limiting the nature and extent of the jury trial inquiry. The Court explained that, while the potential Due Process problem arose out of "*Mullaney*'s insistence that a State cannot manipulate its way out of *Winship*, and from *Patterson's* recognition of a limit on state authority to reallocate traditional burdens of proof," *Jones*, 526 U.S. at 243, the threat to the right to trial by jury was "evident from the practical implications of assuming Sixth Amendment indifference to treating a fact that sets the sentencing range as a sentencing factor, not an element," *id.*

Moreover, the *Jones* Court explained that "the history bearing on the Framers' understanding of the Sixth Amendment principle [did not] demonstrate[] an accepted tolerance for exclusively judicial factfinding to peg penalty limits." *Id.* at 244. That history revealed instead a common understanding that the right of trial by jury was of central importance to the preservation of liberty, *id.* at 246, and that the finding of facts was a "sacred" prerogative of the jury beyond any possible dispute, *id.* at 247. After examining this history, the *Jones* Court concluded that "diminishment of the jury's significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled." *Id.* at 248.

Apprendi confirmed what *Jones* had suggested: The constitutionality of a sentencing factor that "sets the sentencing range," *Jones*, 526 U.S. at 243, turns not merely on abstract notions of Due Process, but on the concrete protections of trial by jury, the "great bulwark of [our] civil and political liberties." *Apprendi*, 530 U.S. at 477 (quoting 2 J. Story, *Commentaries on the Constitution of the United States* 540-41 (4th ed. 1873)) (alteration in original). At our Nation's founding, the distinction *McMillan* drew between mandatory sentencing factors and elements of a crime was "unknown," *id.* at 478, as criminal laws for felonies generally set a "particular sentence for each offense," *id.* at 479. However, then as now, the jury right was not abridged by the exercise of judicial discretion "*within the range* prescribed by statute." *Id.* at 481. Analyzing the historic right to trial by jury, the Court in *Apprendi* adopted the constitutional rule proposed by Justice Stevens's concurrence in *Jones*: "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 490 (alteration in original) (internal quotation marks omitted).

Although its decision appeared to conflict with *McMillan*, *see id.* at 533 (O'Connor, J., dissenting), the *Apprendi* Court did not expressly overrule it, instead preferring to "limit [*McMillan*'s] holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict," and "reserv[ing] for another day the question whether

stare decisis considerations preclude reconsideration of its narrower holding." *Id.* at 487 n.13.

Justice Thomas's concurrence went further. After examining the common law cases in great detail, he observed that these cases often involved facts that triggered an entirely new sentencing range—at "both the top and bottom"—and noted that courts finding such facts to be elements "did not bother with any distinction between changes in the maximum and the minimum." *Id.* at 522 (Thomas, J., concurring). Thus he concluded that it is "clear that the common law rule would cover the *McMillan* situation." *Id.* at 521.

B. As Five Justices in *Harris* Concluded, *Apprendi* Logically Applies to Facts That Trigger Mandatory Minimums.

Harris v. United States, 536 U.S. 545 (2002), presented the Court with the opportunity either to hold that *McMillan* was consistent with *Apprendi*, or to reject *McMillan* in favor of *Apprendi*. Four Members of the Court found *McMillan* logically consistent with *Apprendi* and opined that it should survive. Four Members thought the cases were inconsistent and that *McMillan* should be overruled. Splitting the difference was Justice Breyer. Justice Breyer agreed with the four dissenting Justices that the logical import of *Apprendi* was that *McMillan* was no longer good law. But Justice Breyer voted not to overrule *McMillan* because he was concerned that an extension of *Apprendi*'s principles to mandatory minimum sentences would have adverse practical and legal consequences for the operation of

the Sentencing Guidelines. *Id.* at 569-70 (Breyer, J., concurring in part and concurring in the judgment).

In the plurality opinion written by Justice Kennedy, four Members of the Court concluded that *McMillan* could be reconciled with *Apprendi* because "[t]he factual finding in *Apprendi* extended the power of the judge, allowing him or her to impose a punishment exceeding what was authorized by the jury," while "[t]he finding in *McMillan* restrained the judge's power, limiting his or her choices within the authorized range." *Id.* at 567. Central to the *Harris* plurality's effort to harmonize *McMillan* and *Apprendi* was the conclusion that, so long as they do not increase the statutory maximum, facts that require an increased minimum sentence, as visible possession of a firearm did in *McMillan*, would not "alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." *Id.* at 563 (quoting *Jones*, 526 U.S. at 253 (Scalia, J., concurring)).

In a dissenting opinion written by Justice Thomas, four Members of the Court found that *McMillan* could not be distinguished from *Apprendi* and should be overruled. The dissenters argued that, on the basis of the original understanding of the elements of a crime, any fact necessary for the prosecution's entitlement to a particular "kind, degree, or range of punishment" was an element of the crime that must be proved to a jury beyond a reasonable doubt. *Id.* at 575 (Thomas, J., dissenting) (quoting *Apprendi*, 530 U.S. at 501 (Thomas, J., concurring)). Because, like visible possession of a weapon in *McMillan*, whether or not the defendant

brandished a firearm in *Harris* altered the legally-prescribed range of penalties, the fact of such brandishing had to be found by a jury or admitted by the defendant. *Id.*

Justice Breyer agreed with the dissent that *Apprendi* could not be distinguished from *Harris* "in terms of logic." *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment); *see also Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting) ("[A]ll the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum apply *a fortiori* to any matter that would increase a statutory minimum."). Thus, a majority of the Court in *Harris* agreed that the principles announced in *Apprendi* required treating as offense elements those facts that triggered mandatory minimum sentences as a matter of law. *See also United States v. Krieger*, 628 F.3d 857, 867 (7th Cir. 2010) ("[A]t the time the *Harris* case was decided, five Supreme Court justices—a majority—believed that the holding in *McMillan* was inconsistent with *Apprendi*.").

But in *Harris*, Justice Breyer was not yet ready to accept the extension of *Apprendi* to mandatory minimums because he "believe[d] that extending *Apprendi* to mandatory minimums would have adverse practical, as well as legal, consequences." *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). Justice Breyer explained that he opposed applying *Apprendi* to mandatory minimums as a policy matter because he predicted that this would, in practice, transfer power from juries to prosecutors and would have the

"seriously adverse" legal consequence of diminishing Congress's "constitutional authority to define crimes through the specification of elements, to shape criminal sentences through the specification of sentencing factors, and to limit judicial discretion in applying those factors in particular cases." *Id.* at 571-72 (citing *Apprendi*, 530 U.S. at 555 (Breyer, J. dissenting)).

C. By Its Own Terms, *Harris* Must Now Give Way to *Apprendi*.

Justice Breyer's controlling fifth vote in *Harris* was predicated on conditions that no longer hold true. When *Harris* came down, just two years after *Apprendi*, Justice Breyer could not "yet accept [*Apprendi*'s] rule." *Harris*, 536 U.S. at 569 (Breyer, J., concurring in part and concurring in the judgment). Since then, *Apprendi* has become firmly entrenched in the Court's jurisprudence and the Nation's criminal justice systems. This Court has now applied or reiterated the rule at least a dozen times since the *Harris* decision. *See, e.g.*, *Blakely*, 542 U.S. 296; *Booker*, 543 U.S. 220; *Shepard v. United States*, 544 U.S. 13 (2005); *Washington v. Recuenco*, 548 U.S. 212 (2006); *Cunningham*, 549 U.S. 270; *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Kimbrough v. United States*, 552 U.S. 85 (2007); *Oregon v. Ice*, 555 U.S. 160 (2009); *Spears v. United States*, 555 U.S. 261 (2009); *United States v. O'Brien*, 130 S. Ct. 2169 (2010); *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012).

As a result, there are no longer any practical or legal "consequences"—adverse or otherwise—the avoidance of which could support exempting mandatory minimums from *Apprendi*'s logic. Perhaps most critically, the mandatory U.S. Sentencing Guidelines have been held unconstitutional. And while, as we explain *infra*, *Apprendi*'s rule is both consistent with the goals of modern sentencing reform and beneficial to criminal defendants, even if *Apprendi* were neither, its effects should not be undone by an arbitrary exception for facts triggering mandatory minimums. Indeed, as this Court recently recognized, for many statutes, including § 924(c), an increased mandatory minimum is significantly more important "in practice" than an increase in the statutory maximum. *See O'Brien*, 130 S. Ct. at 2177-78 (recognizing undisputed evidence that "most courts impose the mandatory minimum of 7 years' imprisonment for brandishing a nonspecific weapon" notwithstanding an assumed statutory maximum of life imprisonment).

Apprendi is now an established precedent that has been accepted even by those Members of the Court, like Justice Breyer, who believed it was wrongly decided. *See* Tr. of Oral Arg. at 20, *United States v. O'Brien*, 130 S. Ct. 2169 ("But in *Harris*, I said that I thought *Apprendi* does cover mandatory minimums, but I don't accept *Apprendi*. Well, at some point I guess I have to accept *Apprendi*, because it's the law and has been for some time.") (statement of Justice Breyer). Thus, the opinion of five Justices in *Harris* that the logic of *Apprendi* dictates treating facts as elements of an offense if, as

a matter of law, they mandate a particular minimum sentence, is now binding.

D. Even the *Harris* Plurality Has Been Undermined by *Booker*.

That the contingent premises on which Justice Breyer's controlling concurrence was based are no longer viable is, by itself, sufficient to require the conclusion that *Harris* is no longer good law. But, even if that were not the case, principles of *stare decisis* would not bind this Court to the plurality's unsupportable exception to *Apprendi*, as Petitioner argues in greater detail. Pet'r Br. 38-43; *see also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63-66 (1996). To that discussion, we would add the observation that *Booker* substantially undermined the *Harris* plurality opinion. The Government conceded in *Booker* that to apply *Blakely* to the Sentencing Guidelines would result in the overruling of *Harris* on its facts. Brief for the United States at 38 n.16, *United States v. Booker*, 543 U.S. 220 (2005) (No. 04-104), 2004 WL 1967056.[4]

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[4] The Government explained that under the then-binding Guidelines, the court's finding of brandishing increased both the mandatory minimum sentence and the maximum Guidelines sentence. *Id.* (citing *Harris*, 536 U.S. at 578 & n.4 (Thomas, J., dissenting)). *Booker* and *Blakely*, of course, held that a fact that increased a binding Guidelines maximum had to be found by the jury or admitted by the defendant. And while this Court ultimately adopted a remedy in *Booker* that made the Guidelines advisory, that does not change the fact that the sentence in *Harris*—which increased the mandatory maximum Guideline sentence on the basis of a judicial finding—would not be proper under *Booker*.

By applying *Apprendi* to the Sentencing Guidelines, even though the Guidelines do not exceed the relevant statutory maximum, the *Booker* Court rejected much of the logic underpinning the *Harris* plurality. The plurality opinion in *Harris* and the majority opinion in *McMillan* both depend on a proposition squarely rejected by *Booker*—that only the statutory maximum has Sixth Amendment significance and a sentence can be increased by judicial findings as long as it remains under that maximum. This notion led *McMillan* to hold, and the *Harris* plurality to agree, that a mandatory minimum statute was constitutional because it "simply took one factor that has always been considered by sentencing courts to bear on punishment . . . and dictated the precise weight to be given that factor." *McMillan*, 477 U.S. at 89-90; *Harris*, 536 U.S. at 559 (Kennedy, J., concurring). The *Harris* plurality argued that while mandatory minimums have a "practical effect" on the sentence, 536 U.S. at 566, mandatory minimums do not "alter the congressionally prescribed range of penalties to which a criminal defendant is exposed," *id.* at 563 (quoting *Jones*, 526 U.S. at 253 (Scalia, J., concurring)); *see also McMillan*, 477 U.S. at 88.

Booker, however, rejected the proposition that whether a fact must be found by a jury turns on whether the existence of that fact requires the sentencing court to impose a sentence within or above the statutory range. Rather, the *Booker* Court held the Sentencing Guidelines unconstitutional even though the sentence Booker himself received was below the statutory maximum for the offense

and the increase in the binding Guidelines range was based on the court's finding of a fact—drug quantity—traditionally considered by courts in setting punishment. *Booker*, 543 U.S. at 235. In doing so, *Booker* made clear that it is the *mandatory* effect of the factual finding that is decisive, not whether or not the sentence falls below a statutory maximum. Thus, the Court concluded: "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Id.* at 233.

To be sure, *Booker* did not directly challenge *Harris*'s loophole for judicial factfinding that increases the bottom of a binding sentencing range. *See Booker*, 543 U.S. at 244. But, as five Justices in *Harris* concluded, the principles that underlie the guarantee of trial by jury and that animated this Court's decisions in *Apprendi*, *Blakely*, *Booker*, *Cunningham*, and, just last Term, *Southern Union Company*, render the *Harris* exception invalid. These principles emerged from "the ideals our constitutional tradition assimilated from the common law." *Id.* at 238 (citing *Jones*, 543 U.S. at 244-48). Chief among them was that ordinary citizens should stand between a potentially tyrannical government and its entitlement to the criminal sanction. *See id.* at 237-39. That "common-law ideal of limited state power accomplished by strict division of authority between judge and jury" motivates the jury provisions contained in Article III

and the Sixth Amendment. *Blakely*, 542 U.S. at 313. "[T]he principles that animated the decision in *Apprendi* and the bases for the historical practice upon which *Apprendi* rested" make clear that "there are no logical grounds for treating facts triggering mandatory minimums any differently than facts that increase the statutory maximum." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting).

III. Applying *Apprendi* to Mandatory Minimums Is Consistent with the Goals of Modern Sentencing Reform.

Justice Breyer resisted taking *Apprendi* to its logical conclusion in *Harris* because of his concern that doing so would undermine sentencing reform and particularly the Sentencing Guidelines. *Harris*, 536 U.S. at 572 (Breyer, J., concurring in part and concurring in the judgment) (citing *Apprendi*, 530 U.S. at 555 (Breyer, J., dissenting)). The Court later made clear in *Blakely* and *Booker* that the rule in *Apprendi* applies to mandatory guidelines, despite Justice Breyer's effort in *Harris* to keep them shielded from *Apprendi*'s reach. More fundamentally, Justice Breyer's concern about the effect of *Apprendi* on sentencing reform was misplaced, as demonstrated by both state and federal sentencing practice since *Apprendi* was decided. In fact, the pragmatic considerations that led Justice Breyer in his *Harris* concurrence to resist the extension of *Apprendi* to mandatory minimums all point in the opposite direction now, requiring the application of *Apprendi* to all facts necessary to set a binding sentencing range.

A. Taking *Apprendi* and *Booker* to Their Logical Conclusions and Treating Mandatory Minimum Sentencing Provisions as Offense Elements Furthers the Goals of Modern Sentencing Reform.

In *Harris*, Justice Breyer expressed concern that extending *Apprendi* to mandatory minimums would undermine modern sentencing reforms, particularly the Sentencing Guidelines, which seek to promote proportionality and uniformity in sentencing. *Harris*, 536 U.S. at 572 (Breyer, J., concurring in part and concurring in the judgment); *see also Apprendi*, 530 U.S. at 559 (Breyer, J., dissenting) (arguing that these basic goals of modern sentencing reform are also demanded by the Constitution as a matter of "basic 'fairness'"). But to treat mandatory minimums as an exception to the holding of *Apprendi*, *Blakely*, and *Booker* would, in fact, undermine these goals.

Although the Sentencing Guidelines have been advisory since *Booker*, they continue to achieve strong compliance from the federal judiciary.[5] This is consistent with the experiences of those states that have purely advisory guidelines.[6] The prevailing

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[5] *See United States Sentencing Commission Preliminary Quarterly Data Report* (3d Quarter Release, Preliminary Fiscal Year 2012 Data) tbl. 1 (2012), *available at* http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_3rd_Quarter_Report.pdf (reporting that federal judges sentence below the guideline range without a government motion in only 16.7% of cases).

[6] *See, e.g.,* Virginia Criminal Sentencing Commission, 2011 Annual Report 12 (2011), *available at*

view among sentencing experts and judges is that the post-*Booker* Guidelines regime improves upon the pre-Guidelines landscape because it avoids the pitfalls of the old system that often resulted in dissimilar cases being treated alike, while at the same time maintaining a general sentencing consensus.[7] After *Booker*, a federal sentencing judge is, in the estimation of Judge Nancy Gertner, "enable[d] . . . to exercise his or her discretion in a reasoned and careful way."[8] As another federal judge summarized the state of the law in testimony

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http://www.vcsc.virginia.gov/2011AnnualReport.pdf (reporting that Virginia's advisory guidelines have a compliance rate of approximately 79%); Maryland State Commission on Criminal Sentencing Policy, 2011 Annual Report 30 (2012), *available at* http://www.msccsp.org/Files/Reports/ar2011.pdf (reporting that Maryland's advisory guidelines have a compliance rate of 79.1%, based on data from fiscal year 2011); Ronald F. Wright, Professor of Law and Associate Dean for Academic Affairs, Wake Forest University School of Law, Statement Before the United States Sentencing Commission, Regional Hearing, at 6-7 (Feb. 11, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090210-11/Wright_statement.pdf (noting that compliance rates for Pennsylvania, North Carolina and Minnesota hovered around 75% despite dramatic differences in their legal force).

[7] Wright, *supra* note 6, at 9-11; Rachel E. Barkow, Statement Before the United States Sentencing Commission, Regional Hearing, at 6-7 (July 10, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Barkow_testimony.pdf.

[8] The Honorable Nancy Gertner, Statement Before the United States Sentencing Commission Public Hearing, at 4 (July 10, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Gertner_Testimony.pdf.

before the United States Sentencing Commission in contrasting the pre- and post-*Booker* eras: "[T]he Guidelines g[a]ve judges the means to sentence similar defendants similarly, but took away the opportunity to sentence different defendants differently. We now have that opportunity."[9]

Allowing a loophole from the *Apprendi-Blakely-Booker* line of cases for facts that trigger mandatory minimums would significantly undercut the goals that the Guidelines are meant to achieve. Across the political spectrum, countless judges, legislators, academics and policy experts—from Chief Justice Rehnquist and Senator Orrin Hatch, to Professors Bill Stuntz and Stephen Schulhofer, to the Rand Institute, and even the U.S. Sentencing Commission—have warned that mandatory minimums increase disparity and undermine

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[9] Letter from the Honorable Donetta W. Ambrose, to Judith Sheon, Staff Director, U.S. Sentencing Comm'n, at 4 (June 25, 2008), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Ambrose_testimony.pdf; *see also, e.g.*, The Honorable Denny Chin, Statement Before the United States Sentencing Commission Public Hearing, at 3-4 (July 9, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Chin_testimony.pdf; The Honorable Robert J. Conrad, Jr., Statement Before the United States Sentencing Commission Public Hearing, at 3 (Feb. 11, 2009), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090210-11/Judge%20Robert%20Conrad%20021109.pdf.

proportionality.[10] By elevating a single variable over any other consideration, mandatory minimums "rarely reflect an effort to achieve sentencing proportionality." *Harris*, 536 U.S. at 570-71 (Breyer, J., concurring in part and concurring in the judgment). They are, in the words of the Sentencing Commission after a long study of how mandatory minimums have worked in practice, "fundamentally inconsistent with Congress'[s] simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines." *Id.* at 570.[11]

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[10] *See* Chief Justice William H. Rehnquist, Luncheon Address at the Inaugural Symposium on Crime and Punishment in the United States (June 18, 1993), *in United States Sentencing Commission, Drugs and Violence in America: Proceedings of the Inaugural Symposium on Crime and Punishment in the United States* 284-86 (1993); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 Wake Forest L. Rev. 185, 194-95 (1993); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 595 (2001) ("[A]bolishing mandatory minima would be a great gain . . . ."); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 Wake Forest L. Rev. 199 (1993); Jonathan P. Caulkins et al., Drug Policy Research Center, RAND, *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* 12-25, 75-80 (1997); *United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System (2011)* [hereinafter *Sentencing Commission Report*], *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

[11] *See also Sentencing Commission Report* 345–48.

Because mandatory sentences focus on a single variable, they often also do a disservice to victims. More than 77% of the cases involving mandatory minimum sentences in the federal system involve drug offenses.[12] Then-Judge Cassell testified on behalf of the Judicial Conference of the United States before the House of Representatives and explained how applying these mandatory minimums sends the wrong message to victims of crime. He noted that "[w]hen the sentence for actual violence inflicted on a victim is dwarfed by a sentence for carrying guns to several drug deals, the implicit message to victims is that their real pain and suffering counts for less than some abstract 'war on drugs.'"[13] Moreover, as Professor Stuntz has written, these mandatory sentences—which strike judges, victims and academic observers as perversely misaligned—do not even "accurately capture

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[12] In the federal system, most mandatory minimum sentences apply to drug offenses. In fiscal year 2010, there were 19,896 primary offense counts carrying a mandatory minimum term of imprisonment. Of these, 77.4% were for drug offenses. Firearms offenses made up another 11.9%. *Sentencing Commission Report* D-2.

[13] Judge Paul Cassell, Statement on Behalf of the Judicial Conference of the United States Before the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security (June 2007), *reprinted in* 19 Fed. Sent. R. 344, 344 (2007). One of Judge Cassell's cases demonstrates in vivid detail his point. In *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006), a first-time offender convicted of possessing a gun on three occasions—twice while selling approximately $350 worth of marijuana and once in his home—found himself with a sentence far greater than the sentences for individuals who rape, murder, kidnap, hijack an airplane, or detonate bombs in airplanes. *Id.* at 1244-46.

majoritarian sensibilities" because the sentences are set with the knowledge that many if not most of "those eligible for the minimum will not receive it, either because police fail to arrest or because prosecutors fail to charge the qualifying crime." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 595 (2001).

And although one of the main goals of the sentencing reform movement has been the elimination of racial disparities in sentencing, mandatory minimum sentencing has worked against that effort. Black offenders make up 31.5% of those convicted of offenses carrying mandatory minimum sentences, and Hispanic offenders make up 38.3%.[14] Black offenders comprise a greater percentage of offenders convicted of a statute carrying a mandatory minimum penalty than their already high percentage (23.8%) of the overall offender population.[15] In addition, black offenders are the least likely to receive relief from mandatory minimum sentences either by providing substantial assistance to the Government or through the safety valve provision,[16] and are thus the most likely to remain subject to

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[14] *Sentencing Commission Report* xxviii.

[15] Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security, at 2-3 (June 26, 2007), *reprinted in* 19 Fed. Sent. R., 335, 336 & tbl. 1 (2007).

[16] *See Sentencing Commission Report* xxviii (stating that black offenders receive relief from mandatory minimums in only 34.9% of cases, as compared to 46.5% for white offenders and 55.7% for Hispanic offenders).

mandatory minimum penalties at sentencing.[17] In the context of mandatory minimum sentences for firearms offenses, the racial disparities are even more pronounced. Black offenders make up 55.7% of those subject to a mandatory minimum sentence under § 924(c).[18] Indeed, the U.S. Sentencing Commission analyzed the effects of mandatory sentencing guidelines and mandatory minimum statutes and concluded that together they "have a greater adverse impact on Black offenders than did the factors taken into account by judges in the discretionary system in place immediately prior to guidelines implementation."[19] And recent scholarship suggests that the Sentencing Commission data may understate the racial disparities caused by mandatory minimums. According to one recent study, a prosecutor's initial decision to charge an offense carrying a mandatory minimum may account for the entire gap between the sentences for similarly situated black and white offenders. Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in the Criminal Justice Process: Prosecutors, Judges, and the Effects of* United States v. Booker, at 19 (Nov. 1, 2012), *available at* http://ssrn.com/abstract=2170148. Worse, the prosecutors in that study's sample "were nearly *twice*

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[17] *Id.* at xxix (stating that 65.1% of black offenders remained subject to mandatory minimums at sentencing, compared to 53.5% of white offenders and 44.3% of Hispanic offenders).

[18] *Id.* at 363.

[19] *United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 135 (2004).

as likely to bring such a charge against black defendants" even controlling for pre-charge case characteristics. *Id.* at 2. In contrast, "nothing in . . . judges' use of their post-*Booker* discretion exacerbated racial disparity" in sentencing. *Id.* at 4; *accord* Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. Empirical Legal Stud. 726 (2012) (finding that judicial discretion does not contribute to, and may mitigate, racial disparities in sentencing).

On top of all these other shortcomings, mandatory minimum sentences are less effective than discretionary sentencing and drug treatment in reducing drug-related crime. One study found, for instance, that conventional enforcement is nearly *twice* as cost-effective as mandatory minimums in reducing cocaine consumption. Treatment for heavy users was about *three* times more cost-effective.[20]

If the Court were to refuse to accept the logical import of the *Apprendi-Blakely-Booker* line of cases as it applies to mandatory minimum sentences, it would create a strong and perverse incentive for legislatures to place greater reliance on mandatory minimums, even though they undermine the goals of modern sentencing reform. *See Apprendi*, 530 U.S. at 564 (Breyer, J., dissenting) ("[B]y leaving mandatory minimum sentences untouched, the majority's rule simply encourages any legislature interested in asserting control over the sentencing

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[20] *See* Caulkins, et al., *supra* note 10, at 49.

process to do so by creating those minimums."); *id.* (noting that an increase in mandatory minimums "would mean significantly less procedural fairness, not more"). After *Booker*, *Blakely*, and *Cunningham*, legislatures can no longer dictate sentencing increases as a matter of law through mandatory sentencing guidelines based merely on judicial factfinding applying a preponderance standard of proof. If the Court allows a loophole for mandatory minimum sentencing provisions, however, legislatures can simply bypass the jury's constitutional role to achieve the same result. Indeed, the Department of Justice has already recognized the value of a mandatory minimum loophole. After *Booker* was decided, the Justice Department considered a "fix" to the Sentencing Guidelines that would have turned the bottom of every Guideline range into a mandatory minimum, while leaving the Guidelines maximums advisory.[21] Of course, this would be no "fix" at all, but instead a direct circumvention of the jury guarantee.

But there is a strong incentive for the Executive Branch to urge Congress to take such an approach because prosecutorial power to control sentencing increases under mandatory minimum regimes. As Justice Breyer has explained, mandatory minimum sentences "transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that

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[21] *See* Douglas A. Berman, *Tweaking* Booker*: Advisory Guidelines in the Federal System*, 43 Hous. L. Rev. 341, 356-59 (2006).

Congress created Guidelines to eliminate." *Harris*, 536 U.S. at 571 (Breyer, J., concurring in part and concurring in the judgment); *see also Blakely*, 542 U.S. at 331 (Breyer, J., dissenting). This view is shared by other experts as well.[22] In other words, mandatory minimum statutes "give prosecutors the ability to define their own sentencing rules." Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. at 595; *see also* Barkow, 152 U. Pa. L. Rev. at 102 (explaining that mandatory minimums permit the government to "dictate criminal punishment without an effective judicial check").

Mandatory minimums are anathema to the goals of the sentencing reform movement. Far from promoting uniformity, they exacerbate disparity, including racial disparity. They unsettle the balance of powers by increasing the power of prosecutors without a corresponding check from the judiciary (either judges or jurors). And they lead to grave injustices.[23] Thus, to exempt mandatory minimums

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[22] *See* Associate Justice Anthony M. Kennedy, Speech at the American Bar Ass'n Annual Meeting (Aug. 9, 2003), *available at* http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_08-09-03.html; Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1963-64 (1992) (explaining that mandatory minimums give prosecutors a "good deal of bargaining power" by permitting them to "threaten a sentence that [otherwise] would have been implausible").

[23] *See, e.g.*, *United States v. Ezell*, 417 F. Supp. 2d 667, 671-73, (E.D. Pa. 2006) (imposing a 132-year mandatory minimum sentence under § 924(c) when the Sentencing Guideline range was 14-17.5 years), *aff'd*, 265 F. App'x 70 (3d Cir. 2008); *United States v. Hungerford*, 465 F.3d 1113, 1114 (9th Cir. 2006)

from the logical reach of *Apprendi* and *Booker* on policy grounds would impede the fundamental goals of sentencing reform, not further them.

B. Contrary to Justice Breyer's Concerns in *Harris*, Defendants Have Not Been Harmed Under *Apprendi*.

In addition to the concern with sentencing reform in general, Justice Breyer also expressed in *Harris* his concern that defendants would ultimately suffer under *Apprendi*. 536 U.S. at 571 (Breyer, J., concurring in part, concurring in the judgment). This worry prompted Justice Breyer to conclude that *Apprendi* should be limited as much as possible, regardless of whether the logic of its holding would otherwise apply.

But contrary to Justice Breyer's concerns, empirical analysis shows that *Apprendi*'s recognition of "jury trial rights substantially benefits defendants" by lowering sentences.[24] And this is

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(affirming a 159-year sentence for conspiracy to violate § 924(c), even though the defendant never touched the gun in question and had no prior criminal record) (2007); *see also* Judge Mark W. Bennett, *I'm Tired of Sending Drug Offenders to Prison*, Pittsburgh Post-Gazette, Nov. 8, 2012, at B5 (recalling a defendant addicted to methamphetamines who received a 20-year mandatory minimum sentence because of a prior drug conviction in county court), *available at* http://www.post-gazette.com/stories/opinion/perspectives/im-tired-of-sending-drug-offenders-to-prison-661058/.

[24] *See, e.g.*, J.J. Prescott, *Measuring the Consequences of Criminal Jury Trial Protections* 3, 24-27, and 53, tbl. 2 (Jan. 2006) (unpublished manuscript), *available at* http://www-personal.umich.edu/~jjpresco/Prescott.Measuring_Jury_Trial_Protections_Jan_2006.pdf (empirical review finding that

true whether one looks at cases that go to trial or at cases where the defendant pleads guilty.[25] This is what organizations such as the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders expected when they urged the Court in their *amici* filings in *Apprendi*, *Harris*, *Blakely*, and *Booker* to respect the jury guarantee and require any fact that mandates a particular sentence or sentencing range to be found by a jury beyond a reasonable doubt. These groups, with their experience in the trenches of criminal justice, have every incentive to assess accurately what will best protect defendants' rights. And these groups know all too well that defendants suffer greatly when mandatory minimums apply without the check of a jury. In many instances, juries consider the sentences required by mandatory minimums to be unduly harsh and would impose substantially lower sentences if they had any say in the matter. *See, e.g., United States v. Angelos*, 345 F. Supp. 2d 1227, 1242 (D. Utah 2004) (in case where

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Apprendi's recognition of a defendant's jury trial right benefits defendants by reducing the average sentence in all criminal history categories, with some offenders benefitting by more than 5%).

[25] *Id.* at 66-67, tbls. A1, A2. The empirical evidence post-*Booker* is to the same effect. *See United States Sentencing Commission Annual Report Sourcebook*, tbl. 31A (2008). Prosecutors agree. *See* Mary Patrice Brown & Steven E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1063, 1090 (2006) (observing that "on balance, *Booker* clearly takes some negotiating leverage away from the prosecution" in bargaining over the defendant's potential cooperation).

§ 924(c) resulted in 61.5-year sentence due to the imposition of mandatory minimums, "the jurors recommended a mean sentence of about 18 years and a median sentence of 15 years," and "[n]ot one of the jurors recommended a sentence closely approaching" the mandatory minimum), *aff'd*, 433 F.3d 738 (10th Cir. 2006).[26]

Legislators often draft mandatory minimums with the most culpable offenders in mind, only to see them applied indiscriminately without regard to the defendant's blameworthiness.[27] Because these provisions sweep so broadly, prosecutors can use the threat of mandatory minimums to induce and, in some cases, effectively coerce guilty pleas on lesser charges.[28] Although interposing a jury requirement does not make mandatory minimums wise or

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[26] *See also* Bennett, *supra* note 23 ("[F]or all the times I've asked jurors after a drug conviction what they think a fair sentence would be, never has one given a figure even close to the mandatory minimum. It is always far lower.").

[27] *United States v. Dossie*, 851 F. Supp. 2d 478, 481 (E.D.N.Y. 2012) (Gleeson, J.) ("[T]he overwhelming majority of crack defendants who feel the pain of mandatory prison terms are not the criminals Congress had in mind in creating those penalties."); *see also* Paul H. Robinson et al., *The Modern Irrationalities of American Criminal Codes: An Empirical Study of Offense Grading*, 100 J. Crim. L. & Criminology 709, 721-22, 758 (2010) (describing examples from a survey of Pennsylvania residents in which people believed the maximum sentences for specific crimes should be lower than the state's applicable mandatory minimums).

[28] *See* Richard A. Oppel Jr., *Sentencing Shift Gives New Clout to Prosecutors*, N.Y. Times, Sept. 26, 2011, at A1, *available at* http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?pagewanted=all.

effective, it does place a check on prosecutorial power—just as the Framers intended.

It has been true time and again, as it was in this case, that "as a practical matter, a legislated mandatory 'minimum' is far more important to an actual defendant" than the statutory maximum. *Apprendi*, 530 U.S. at 563 (Breyer, J., dissenting). Common law cases recognized as much, treating these mandatory minimums as offense elements to be decided by the jury. *See id.* at 522 (Thomas, J., concurring). Thus, exempting increases in mandatory minimum sentences from the rule in *Apprendi* is neither principled nor wise. Permanently preserving this exemption even in the wake of *Blakely*, *Booker*, and *Cunningham* creates a perverse incentive for reliance on sentencing schemes that are less rational, less consistent, and less transparent, without any corresponding legal or policy benefit. As a result, because the conditions that led Justice Breyer to resist the logical application of *Apprendi* counsel the opposite result in light of *Booker* and the empirical evidence, the Court should clarify that *Booker* effectively overruled *Harris* and that the holding of *Booker* applies to mandatory minimums as well.

IV. Applying *Apprendi* to Mandatory Minimums Will Reduce Uncertainty and Administrative Burdens on the Courts, Not Increase Them.

In addition to furthering the policy goals of modern sentencing reforms, resolving the conflict between *Apprendi* and *Harris* in favor of *Apprendi* will reduce uncertainty in the criminal justice

system and reduce administrative burdens on the courts by clarifying that all facts (other than a prior conviction) necessary to increase the defendant's minimum sentence are offense elements not sentencing factors. Under *Harris*, the answer to whether a fact must be proved to a jury beyond a reasonable doubt or to a judge by a preponderance is rarely so clear. "Congress . . . seldom directly addresses the distinction between sentencing factors and elements," *O'Brien*, 130 S. Ct. at 2175, leaving courts to divine Congressional intent through an amorphous balancing of often ambiguous factors, *id.* at 2176-78 (balancing five factors set forth in *Castillo v. United States*, 530 U.S. 120 (2000)). By itself, Section 924(c) has required this Court's intervention in three separate cases. *See Castillo v. United States*, 530 U.S. 120, 123 (2000); *Harris*, 536 U.S. at 552; *O'Brien*, 130 S. Ct. at 2173. Other divisions of authority can be expected to develop in the future. And each time Congress adds or revises a mandatory minimum, the statutory provisions must be interpreted anew, leaving prosecutors, defense attorneys, and courts to guess whether defendants have a right to insist on indictment and a trial by jury or not. *See* Judge Nancy Gertner, *What Has* Harris *Wrought*, 15 Fed. Sent. R. 83, 86 (2002) (describing the exercise of fitting the provisions of the substantive criminal law into the separate analytical "boxes" of elements and sentencing factors as "like the proverbial round peg and square hole").

As a result, the Government is wrong to suggest that applying *Apprendi* to facts triggering mandatory minimums will be disruptive or require an extensive

legislative response. BIO at 12-13. *Apprendi* provides a clear, easily enforced rule for prosecutors going forward: if they want to be entitled to a higher sentence based on a particular fact, they must charge the fact in the indictment and be ready to prove it beyond a reasonable doubt to a jury. Prosecutors are obviously well-equipped to meet these requirements. Indeed, as this case and *O'Brien* demonstrate, prosecutors often obtain indictments charging facts that they believe are sentencing factors. *See O'Brien*, 130 S. Ct. at 2173; BIO at 3.[29]

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[29] *See also* Superseding Indictment at 30, *United States v. Smith*, No. S1-4:11CR00246 CDP (FRB) (E.D. Mo. June 21, 2012) (charging that certain defendants "did knowingly use, carry, brandish, and discharge a firearm" in violation of § 924(c)); Indictment at 13-14, 24, *United States v. Najera*, No. 12-10089-01-23-MLB, (D. Kan. April 16, 2012) (charging that certain defendants "did knowingly possess firearms and brandish firearms"); Superseding Indictment at 2, *United States v. Loughner*, No. CR 11-0187-TUC-LAB (D. Ariz. Mar. 3, 2011) (charging that the defendant "did knowingly use, carry, brandish and discharge a firearm"); Dep't of Justice Criminal Resource Manual § 227 (sanctioning the practice of charging alternative means of violating statute), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00227.htm. Under current practice, if prosecutors are unable to prove the fact beyond a reasonable doubt, they drop the charge from the indictment and ask the court to find the fact itself. *See O'Brien*, 130 S. Ct. at 2173-74. Applying *Apprendi* to facts triggering mandatory minimums will prevent prosecutors from getting two successive chances to prove they are entitled to an increased minimum sentence.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to reverse the decision of the court of appeals.

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AMICUS CURIAE BRIEF

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BRIEFS

[redacted]

No. 11-9335

IN THE
Supreme Court of the United States

ALLEN RYAN ALLEYNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF FAMILIES AGAINST MANDATORY MINIMUMS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Families Against Mandatory Minimums ("FAMM") is a national, nonprofit, nonpartisan organization whose primary mission is to promote fair and rational criminal justice policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. Founded in 1991, FAMM currently has more than 50,000 members around the country. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through selected *amicus* filings in important cases.

This case is important to FAMM because this Court now has the opportunity to hold that the Sixth Amendment jury trial right recognized in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), applies to sentencing proceedings that involve statutory mandatory minimum sentences. FAMM's brief in this case primarily focuses on historical evidence concerning the understanding when the Sixth Amendment was framed of the types of facts that a prosecutor was required to set forth in an indictment and prove to a trial jury beyond a reasonable doubt. Before turning to that historical analysis, we briefly explain why the question in this case matters to FAMM's members.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus*, its members, or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief, and letters reflecting their consent were filed contemporaneously with this brief.

FAMM's members have, like petitioner Allen Ryan Alleyne, been affected by the rule of *Harris v. United States*, 536 U.S. 545 (2002). These individuals have been subject to lengthy prison sentences that would not have been imposed but for a statutory mandatory minimum – even though no jury ever found facts to support those minimum sentences. Kenosha Fullilove is one such member of FAMM.

Ms. Fullilove was 25 years old when she was sentenced to 10 years in prison, away from her seven-year-old daughter. Ms. Fullilove's offense was helping to plan a bank robbery committed by one of her co-defendants. Like Mr. Alleyne, Ms. Fullilove was sentenced under 18 U.S.C. § 924(c)(1)(A)(ii), which mandates a minimum consecutive sentence of seven years for brandishing a firearm during commission of a violent felony. The jury that convicted Ms. Fullilove was only required to find that she (or her co-defendant) *used* a firearm to commit the robbery.[2] That jury's verdict thus only supported a five-year mandatory minimum sentence under § 924(c)(1)(A)(i). Under *Harris*, the jury was not required to find the facts that supported the seven-year mandatory minimum.

The district judge who sentenced Ms. Fullilove was Judge Virginia Kendall, a former federal prosecutor. Judge Kendall noted Ms. Fullilove's "remarkably denigrated" background growing up with two drug-addicted parents, her "extreme remorse," and her work as a spiritual counselor for her fellow inmates.[3] For those reasons, Judge Kendall granted Ms.

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[2] *See* Trial Tr. at 627:17-22, *United States v. Fullilove*, Case No. 1:09-cr-00052 (N.D. Ill. Sept. 16, 2010).

[3] Sentencing Tr. at 34:20-25, 37:14-20, *Fullilove* (N.D. Ill. Mar. 30, 2011).

Fullilove significant downward departures from the guidelines sentences for two of the counts against her.[4] But Judge Kendall did not have the same discretion when she sentenced Ms. Fullilove under § 924(c). As the judge explained: "[T]here's nothing I can do about a statutory mandatory minimum, because that would mean I would have to somehow say that Congress' statute is not the statute that I am going to comply with, which I can't do."[5]

The Court reached its decision in *Harris* in part by reasoning that mandatory minimum sentencing schemes do not alter the statutory range of authorized punishment but merely "assign[] a uniform weight to factors judges often relied upon when choosing a sentence." 536 U.S. at 558 (plurality). The experience of defendants like Ms. Fullilove, however, shows that mandatory minimum statutes do not direct or guide judicial discretion. Instead, they eliminate it.

Based on that experience, FAMM supports petitioner's arguments that the *Harris* plurality misapprehended the effect of a mandatory minimum sentence as merely "*persuad[ing]* the judge to choose a . . . higher sentence." *Id.* at 566 (plurality) (emphasis added); *see* Pet. Br. 26-28. As set forth in this brief, that mistake also put *Harris* at odds with the historical understanding of grand and trial juries' roles in criminal cases.

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[4] *See id.* at 37:23-25 (imposing sentence of 36 months, below the guidelines minimum of 51 months). Judge Kendall did not impose a "zero sentence" on these counts, perhaps in light of circuit precedent (cited by the prosecution) that disapproved of doing so in order to counteract the effect of a mandatory minimum sentence. *See id.* at 27:16-24.

[5] *Id.* at 13:11-14.

INTRODUCTION AND SUMMARY

A plurality of this Court concluded in *Harris* that, even after *Apprendi* reinvigorated the jury trial right in criminal sentencing proceedings, there remained a fundamental difference between facts that increase the maximum punishment a defendant may receive and facts that increase the mandatory minimum punishment without extending the possible sentence above the statutory maximum. *See* 536 U.S. at 557. The plurality found that the former, but not the latter, "would have been considered an element of an aggravated crime – and thus the domain of the jury – by those who framed the Bill of Rights." *Id.* The plurality further found no "historical evidence showing that facts increasing the defendant's minimum sentence (but not affecting the maximum) have, as a matter of course, been treated as elements." *Id.* at 560. Accordingly, in the plurality's view, there was "no reason to believe that those who framed the Fifth and Sixth Amendments would have thought of [such facts] as the elements of the crime." *Id.*

On the contrary, there is good reason to believe the framers would have thought just that. Direct historical evidence of the framers' views of such facts is "lacking" primarily because – as the *Harris* plurality recognized – until the last century, mandatory minimum sentencing statutes like § 924(c) did not exist. *See id.* (noting that statutes of this kind "were for the most part the product of the 20th century"); *id.* at 579 (Thomas, J., dissenting) (agreeing that "mandatory minimum sentences are . . . 20th-century phenomena"). Criminal statutes in the eighteenth and nineteenth centuries tended to specify either a

maximum penalty only or a range of potential punishments within which the judge had discretion.[6]

Nevertheless, the absence of exactly identical sentencing statutes does not make it impossible to consider whether "a fact giving rise to a mandatory minimum sentence" would "fall within the principle by which history" – more precisely, English and American judges and lawyers from the late eighteenth century to the mid-nineteenth century – "determined what facts were elements." *Id.* at 560-61 (plurality). The *Harris* plurality considered that question and answered that "the authorities from the 19th century confirm" that, in principle, a fact triggering a mandatory minimum would not necessarily have been stated in the indictment or proved to a trial jury. *Id.* at 561.

The plurality was mistaken. Although it appears that mandatory minimum sentencing statutes did not exist in the same form as today when the Sixth Amendment was enacted, the framers *were* familiar with statutes that had a similar effect – that is, statutes that removed discretion that a judge otherwise would have had to impose a more lenient sentence. The facts necessary to trigger such a statutory sentence had to be alleged in the indictment (and ultimately proved to the trial jury).

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[6] *See* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 9-11 (1998) ("Stith & Cabranes"); U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 7-18 (Oct. 2011) (discussing the history of statutory mandatory minimum penalties in the federal system), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm; *id.* App. C (listing statutory ranges in the 1878 Revised Statutes).

Two examples, neither of which the *Harris* plurality considered, support this conclusion. *First*, as set forth in Part I, the framers would have been familiar with statutes that codified common-law criminal offenses and set out fixed penalties for those offenses. The statutory version of an offense often required additional facts to be proved that were not elements of the underlying common-law offense. Treatises and cases from the early nineteenth century (and some older ones as well) state as a settled rule that the specific circumstances in the statute had to be described in the indictment. Otherwise, the defendant could (at most) be sentenced only under common law.

In at least some situations (involving statutory fines for misdemeanor offenses), the sentencing judge would have had discretion at common law to impose a fine comparable to the mandatory statutory fine. But the judge would not have been obligated to impose that particular fine in a case brought under the common law and could have chosen to impose a lower one (or some alternative punishment instead). Thus, the charging of the statutory offense, like a modern mandatory minimum, took away the judge's discretion but did not necessarily increase the overall penalty that the defendant would have faced at common law. The facts that the prosecution had to prove to obtain this result were elements of the offense.

Second, as explained in Part II, the framers would also have been familiar with one particularly well-known type of mandatory sentence: the death sentence that was imposed for felonies at common law. By the late eighteenth and early nineteenth centuries, the common-law death sentence was usually not imposed on first offenders because of a doctrine known as the "benefit of clergy" – a legal fiction

through which the defendant claimed to be subject to the jurisdiction of the ecclesiastical courts, and therefore exempt from the death sentence. The benefit of clergy was ultimately a discretionary doctrine within the control of the trial judge, and there are examples (though rare ones, at least by the eighteenth century) in which judges withheld the benefit and sentenced a defendant to death for a common-law felony.

Parliament and the colonial legislatures passed statutes that took away the benefit of clergy when certain aggravating circumstances were present – such as larceny of more than a certain amount, arson of a certain type of building, and certain repeat offenses. When the statutory requirements were met, the judge had no option of leniency, but was required to sentence a defendant to death. English and early American courts recognized that these aggravating circumstances had to be alleged in the indictment and proved to the trial jury.

In both examples, a statute mandated a particular penalty that a judge could have imposed even without the statute. Yet, because the statute changed the controlling rule and *required* the judge to impose such a penalty, the circumstances necessary to trigger such a statute's application were treated as subject to "the common-law understanding that a fact that is by law the basis for imposing or increasing punishment is an element." *Apprendi*, 530 U.S. at 502 (Thomas, J., concurring). As a result, by holding in *Harris* that the facts recited in such statutes need not be charged in an indictment and proven to a jury beyond a reasonable doubt, this Court departed from the historical understanding of the elements of a crime. The Court should now correct that error, among the others *Harris* made, and overrule *Harris*.

ARGUMENT

I. STATUTES THAT RESTRICTED SENTENCING DISCRETION FOR COMMON-LAW MISDEMEANORS CREATED SEPARATE OFFENSES

1. As a rule, felonies at common law were capital offenses, punishable by death. *See, e.g.*, J. H. Baker, *An Introduction to English Legal History* 584-85 (3d ed. 1990) ("Baker"). The death penalty might be avoided through doctrines permitting the exercise of ecclesiastical or executive mercy – such as sanctuary, pardon, or benefit of clergy. *See id.* at 585-91; *infra* Part II. As a practical matter, the sentence was also subject to the possibility that a jury would refuse to convict of a capital offense. But in principle, at least, the penalty for felons was fixed. For misdemeanors and other lesser crimes, however, the judge typically had wide discretion to sentence the convicted defendant within a range of corporal or pecuniary punishments. *See Jones v. United States*, 526 U.S. 227, 244 (1999) (noting "the breadth of judicial discretion over fines and corporal punishment in less important, misdemeanor cases"); *see also Apprendi*, 530 U.S. at 480 n.7.

Thus, in England, punishment for misdemeanors "was at the discretion of the justices, provided that it did not touch life or limb, and was not disproportionate to the offence." Baker at 584; *see* 4 William Blackstone, *Commentaries on the Laws of England* *356-57 ("Blackstone") (citing discretion of judge in misdemeanor cases to impose a "trivial punishment"); 2 James Fitzjames Stephen, *A History of the Criminal Law of England* 88 (1883) ("From the earliest period of our history to the present day, the discretion

in misdemeanour at common law has been vested in the judge.").

American judges likewise exercised broad discretion over the punishment of misdemeanors, during the colonial period and well into the nineteenth century. *See, e.g.*, Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 Am. J. Legal Hist. 326, 348-50 (1982) (describing colonial judges' discretion over non-capital punishments such as whipping and fines); Stith & Cabranes at 9 ("From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion."). That discretion was particularly broad with regard to fines. *See Southern Union Co. v. United States*, 132 S. Ct. 2344, 2353 (2012) (observing that "judges in the colonies and during the founding era 'possessed a great deal of discretion' in determining whether to impose a fine and in what amount") (quoting Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About Apprendi*, 82 N.C. L. Rev. 621, 640-41 (2004)).

In nineteenth-century Connecticut, for example, the punishment generally prescribed for minor offenses was imprisonment of 30 days to one year, a fine not exceeding $300, or some combination of the two, "at the discretion of the court having cognisance of the offence." *State v. Hyde*, 11 Conn. 541, 543-44 (1836). In colonial Virginia, there was apparently a common practice under which justices of the peace would impose discretionary punishment simply on the basis of uncertainty as to whether the charged offense was a felony or misdemeanor – imposing up to 39 lashes as the justice deemed appropriate under the circumstances. *See* Arthur P. Scott, *Criminal Law in Colonial Virginia* 61 (1930) ("Scott") (describ-

ing this practice as having "no warrant in the letter of the law" but suggesting that it was "substantially within [the justices'] rights").

This background principle of judicial sentencing discretion was often restricted in specific cases by statutes dealing with particular offenses. When legislatures passed such statutes, they would usually specify both the elements of the offense and the resulting punishment. In England, Parliament early on replaced common-law remedies for many misdemeanors with "statutes which rendered their provisions more specific, and their penalties more severe." 1 Francis Wharton, *A Treatise on the Criminal Law of the United States* § 3, at 5 (7th ed. 1874) ("Wharton"). Although Wharton observes that early American jurisdictions tended to "depend[] much more on the adjudication of the courts than the enactments of the legislature," *id.*, there are certainly also framing-era examples of American statutes that imposed specific fines or other penalties for offenses that had been misdemeanors at common law and subject to discretionary sentencing.[7]

The codification of criminal sentences limited judicial discretion by dictating a particular punish-

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[7] *See, e.g.*, *Levy Court of Washington County v. Ringgold*, 15 F. Cas. 439, 440-41 (C.C.D.C. 1826) (No. 8,305) (discussing certain "fines, penalties, and forfeitures . . . such as were imposed and fixed by [a] statute" adopted by Maryland in 1795, and distinguishing them from "those discretionary fines which the courts of law imposed for misdemeanors and other common-law offences"), *aff'd*, 30 U.S. (5 Pet.) 451 (1831); *Commonwealth v. Newell*, 7 Mass. 245, 247-49 (1810) (discussing the history of the common-law misdemeanor of mayhem and concluding that the same crime remained a misdemeanor, rather than a felony, under an 1804 statute providing that it could be punished by imprisonment).

ment that might have been within the range allowed at common law, but was not coextensive with that range. In order to rely on the statutory form of a crime that had been recognized at common law, however – and to obtain the resulting punishment – the prosecution was required to identify the statute in the indictment and to plead all the facts that made up the statutory version of the offense.

2. The rule that all of the elements of a statutory offense had to be set forth even to the extent they went beyond the requirements of the common law was well-recognized by English authorities at the time of the framing. An edition of Hale's *History of the Pleas of the Crown* published in 1800, for example, stated the principle that:

> An indictment grounded upon an offense made by act of parliament must by express words bring the offense within the substantial description made in the act of parliament, and those circumstances mentiond [sic] in the statute to make up the offense shall not be supplied by the general conclusion *contra formam statuti.*

2 Matthew Hale, *The History of the Pleas of the Crown* 170 (1800 ed.) ("Hale").[8] "[A]ll the authorities"

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[8] The phrase "*contra formam statuti*," Latin for "against the form of the statute," was a generic formula used to indicate that a statutory rather than a common-law offense was being charged. *See generally Cross v. United States*, 6 F. Cas. 892, 894 (C.C.D. Mass. 1812) (No. 3,434) (Story, J.) (describing as "well settled" the "general rule[] that all offences against statutes shall conclude against the form of the statute"). Thus, Hale's point was that the indictment had to describe the specific facts on which the prosecution relied for the statutory charge and could not allege the mere legal conclusion that the defendant had violated a statute. Indeed, Hale took the even stricter view that, when an indictment attempted to charge a statutory

of the time were in agreement with this principle that "all the circumstances contained in the statutable definition of the offence must be set out on the record." 1 Thomas Starkie, *A Treatise on Criminal Pleading* 206 (1814) ("Starkie") (citing Hale and other authorities).

Starkie, for example, cites a case in which the English courts deemed insufficient an indictment charging the defendant with assaulting the victim and "threatening and menacing to blow the said [victim]'s brains out," all with a felonious intent to steal the victim's money. *Id.* at 207. The indictment was brought under a statute that required as elements the use of an offensive weapon or the making of a demand for money. The allegations in the indictment certainly implied that those criteria were met, but the court held that they were not sufficiently specific to make out a charge of the statutory crime. *See id.* The certainty of the statutory punishment demanded equal certainty in the pleadings.

Early American authorities recognized this rule of criminal pleading as well. Thus, Wharton, a leading nineteenth-century treatise, states: "Eminently is it the case, that where the words of the statute are descriptive of the offence, the indictment should follow the language, and expressly charge the described

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offense by using this formula, but the facts charged would make out only the common-law version of the offense, the indictment "shall be quashed, and the party shall not be put to answer it as an offense at common law." 2 Hale at 171. This latter rule was criticized as overly technical, and a number of American jurisdictions instead permitted the indictment to proceed for the common-law offense that had been charged properly under the facts as stated. *See* 1 Joel Prentiss Bishop, *Commentaries on the Law of Criminal Procedure* § 601, at 362-63 (2d ed. 1872) ("Bishop").

offence on the defendant, or it will be defective." 1 Wharton § 364, at 288; *see id.* at 287 (calling this "a well settled general rule"). As with the English cases described above, "the defendant must be specially brought within all the material words of the statute; and nothing can be taken by intendment." *Id.* at 288.

The same treatise goes on to explain how this rule applied specifically to common-law offenses that were separately made indictable by statute. *See id.* § 371, at 291 ("Where an offence is created by statute, or the statute declares a common law offence committed under peculiar circumstances not necessarily included in the original offence, punishable in a different manner from what it would be without such circumstances; or where the nature of the common law offence is changed by statute from a lower to a higher grade, as where a misdemeanor is changed into a felony; the indictment must be drawn in reference to the provisions of the statute, and conclude *contra formam statuti* . . . .").[9]

Bishop, the author cited as authority by both Justice Thomas's concurrence in *Apprendi*[10] and the *Harris* plurality,[11] is in accord on the key point that,

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[9] *See also* Scott at 66 ("The English law required great precision in naming the person accused, in specifying the time and place of the offense, and in describing the crime itself, so that there might be no doubt as to the particular law broken. The Virginia law was scarcely less careful . . . .").

[10] *See* 530 U.S. at 510-18 (Thomas, J., concurring).

[11] *See* 536 U.S. at 561-62 (plurality). Petitioner ably addresses in his brief (at 23-24 and 33-34) the *Harris* plurality's reliance on a section of Bishop that discusses the proof of aggravating facts as a means to influence (rather than remove) a sentencing judge's discretion, and we will not repeat that discussion here.

Similar examples can be found in *State v. McLearn*, 1 Aik. 311, 1826 WL 1211, at *3-4 (Vt. 1826), which held, in considering an indictment for forgery, that the defendant could be punished only for a common-law misdemeanor because the statutory elements had not been established – the defendant was later convicted of the common-law offense and punished with a fine; in *Commonwealth v. Hoxey*, 16 Mass. (16 Tyng) 385, 387-88 (1820), which held that an indictment that failed to allege the particular statutory offense of disrupting a town meeting nevertheless did allege common-law disorderly conduct; and in *United States v. Lindsay*, 26 F. Cas. 971, 971 (C.C.D.C. 1805) (No. 15,602), which held that an indictment that failed to allege a violation of certain Maryland statutes nevertheless made out a case for "keeping a disorderly house" at common law. In none of these cases was there any suggestion that a conviction under a statute, with a statutory punishment attached, could have been sustained merely because the judge might have imposed a similarly severe punishment as a discretionary matter under the common law.

II. STATUTES THAT WITHDREW THE BENEFIT OF CLERGY FOR FELONIES REQUIRED DETAILED PLEADING AND FACTFINDING

1. Additional light can be shed on the framers' understanding of the procedural requirements for facts that – like those in modern mandatory minimum statutes – removed a defendant's ability to ask a court for leniency by examining the historical treatment of statutes that took away defendants' ability to claim the "benefit of clergy" after a capital felony conviction.

The benefit of clergy is an ancient doctrine that evolved greatly over its lifespan. It originated, as its name suggests, as a special privilege for individuals who literally were members of the clergy: rather than stand trial for a capital crime, such defendants had the right to be "handed over to the ecclesiastical authorities to be dealt with according to Canon law." Baker at 586; *see also* 4 Blackstone at *360; George W. Dalzell, *Benefit of Clergy in America* 10-11 (1955) ("Dalzell"). Successful claimants were often able to avoid any further punishment at all, *see* Baker at 586, and in any event they would not be subject to the death penalty, which the church did not impose. *See* Dalzell at 11.

Over time, the doctrine came to apply to a much broader class of defendants and to have different procedural effects. It ceased to be a jurisdictional mechanism but was instead invoked after the accused had been convicted in the secular court. *See* James Fitzjames Stephen, *A General View of the Criminal Law of England* 35 (2d ed. 1890). In the fourteenth century, it was extended to all men who could read, whether clergy or laymen. *See id.* Even the literacy requirement was relaxed, through the use of a standard verse that an illiterate defendant could memorize and recite. *See* Dalzell at 24-25. By statute, the reading test was ultimately abolished entirely, and the benefit was made available to women as well as to men. *See* Baker at 587-88.

Even as the group of defendants who could obtain the benefit of clergy was expanded, the legislature also began to impose restrictions on the crimes to which it applied. To begin with, Parliament passed a statute that prevented any person from claiming the benefit more than once; this limit was enforced

by branding the defendant, usually by burning his thumb, upon the first felony conviction. *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 37-38 (1983). Eventually, a number of statutes were passed that took away the benefit of clergy (even for first-time offenders) for certain serious offenses. The benefit had never been available for certain crimes, such as high treason and certain forms of arson. *See id.* at 38; Dalzell at 29. And, by statute, Parliament forbade it to those convicted of "murder, piracy, burglary, highway robbery, church robbery, rape, abduction with intent to marry, horsetheft, and stealing privately from the person (pickpocketing) to an amount above one shilling." Langbein, 50 U. Chi. L. Rev. at 38.

Both the benefit of clergy and various exceptions to it were also applied in colonial and early post-Revolutionary America. *See* Preyer, 26 Am. J. Legal Hist. at 331-32 n.9 (describing the doctrine as "an extremely important means of mitigating in practice the use of the death penalty in both England and in the American colonies"). There is an instance of a Virginia convict being "'delivered to the ordinary,'" that is, subjected to the literacy test, as early as 1628. Dalzell at 96-97 (discussing the case of William Reade); Scott at 104 (noting that the benefit of clergy, including "the anomalies and injustices of the English system," were "substantially the same [in Virginia] as in England"). As of 1778, the benefit of clergy was recognized in 12 states. *See* Dalzell at 233. The First Congress was familiar with it and abolished it in 1790 as part of the first federal criminal code. *See id.* at 234 (citing Act of Apr. 30, 1790, ch. 9, § 31, 1 Stat. 112, 119). The doctrine persisted

in some states past the Civil War. *See id.* at 266 (describing its final elimination in South Carolina during Reconstruction).

Where the benefit of clergy applied, it effectively converted a mandatory death sentence for a common-law felony into a discretionary one in which death remained an available punishment. To be sure, it was rare for a judge to deny benefit of clergy to a defendant as a discretionary matter. *See* Baker at 587-88 (noting that "[t]he clemency of the royal judges in extending this privilege was almost as indiscriminate as the harshness of the automatic punishment which occasioned it"). Nevertheless, judges had and at times did exercise that discretion.[12] One historian notes an instance in which a seventeenth-century English judge, irritated by a church official's statement that an obviously illiterate defendant could read, not only denied the benefit of clergy to the defendant but also made the official pay a fine. *See* Dalzell at 25.

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[12] *See* Nancy J. King, *The Origins of Felony Jury Sentencing in the United States*, 78 Chi.-Kent L. Rev. 937, 948-49 (2003) (explaining that "[t]he life or death decision to extend clergy" was placed in the "unbounded" discretion of the court); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 71 n.174 (2003) (noting that, "at the Framing, judges had discretion to extend the benefit of clergy to defendants in capital cases"); Lillquist, 82 N.C. L. Rev. at 633 (noting ways in which "the royal justices could manipulate the benefit of the clergy" in the seventeenth century); *see also* Dalzell at 99 (stating that, by the time Virginia began regulating the doctrine in 1732, benefit of clergy "had often been invoked and granted or denied"), 162 (citing New Jersey statute that eliminated benefit of clergy for certain offenses and left it "open to the court to allow the privilege" for others).

2. Parliament, the colonial legislatures, and later the states passed statutes that took away the benefit of clergy for certain offenses.[13] These statutes were functionally equivalent to mandatory minimum sentences. They constrained discretion that the judge could otherwise have exercised to sentence the defendant either to death (by refusing to allow the benefit of clergy) or to some lesser punishment (by granting it). Thus, the maximum punishment remained the same (death) but the statute, by making death mandatory, effectively elevated the minimum punishment to match that maximum. Just as with statutes that codified common-law offenses and provided definite and harsher minimum penalties, these clergy-stripping statutes were also subject to the requirement that all necessary facts be pleaded in the indictment and proved at trial.

The English and early American treatises are firm on the importance of pleading in the indictment the circumstances that take a case outside the benefit of clergy. *See, e.g.*, 2 Hale at 170 ("[I]f an act of parliament oust clergy in certain cases . . . , tho the offenses themselves were at common law, yet because at common law within clergy, they shall not be ousted of

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[13] *See* Langbein, 50 U. Chi. L. Rev. at 38 (describing statutes that removed the benefit of clergy from "all murder, piracy, burglary, highway robbery, church robbery, rape, abduction with intent to marry, horsetheft, and stealing privately from the person (pickpocketing) to an amount above one shilling"); 4 Blackstone at *366 (explaining that "very many . . . acts of felony[] are ousted of clergy by particular acts of parliament"). For examples of similar legislation during the colonial period, see Dalzell at 107-10 (Virginia), 126-29 (Maryland), 139-40 (Pennsylvania), 162 (New Jersey), 166-67 (Delaware), 223-25 (South Carolina), 225-28 (Georgia). For examples of states passing such legislation after the founding, see *id.* at 252 (Maryland), 258 (North Carolina), 260, 262-63 (South Carolina).

clergy, tho convicted, unless these circumstances . . . be expressed in the indictment."); John Frederick Archbold, *A Summary of the Law Relative to Pleading and Evidence in Criminal Cases* 22 (1824) ("Where a statute takes away the benefit of clergy from a common law felony, if committed under particular circumstances, an indictment for the offence, in order to oust the defendant of clergy, must expressly charge it to have been committed under these circumstances, and must state the circumstances with certainty and precision.").[14]

Framing-era courts were familiar with these pleading rules,[15] and American courts continued to discuss them as relevant well into the mid-nineteenth century. For example, in *Anderson v. State*, 5 Ark. 444 (1844), the state court noted that English law required the use of particular words to describe the offense of murder because those words "had been so used in the statutes, which took away clergy from that offence,

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[14] *See also* Starkie at 206 ("It is a general rule, that all indictments on penal statutes, especially the most penal, must pursue the statute so as to bring the party precisely within it, and this rule holds, as well with respect to statutes which take away clergy from felonies at common law, as to statutes creating new felonies.") (internal quotation marks omitted); 1 Bishop § 614, at 371 (similar).

[15] *See, e.g.*, *State v. Gibbons*, 4 N.J.L. 40, 1818 WL 1456, at *8-9 (N.J. 1818) (opinion of Kirkpatrick, C.J.) (quoting Hale in the course of holding insufficient a misdemeanor indictment for a challenge to a duel); *Commonwealth v. Smith*, 1 Mass. (1 Will.) 245, 247 (1804) (reporter's note citing English authorities for the principle that, because benefit of clergy is taken away by statute for larceny of a certain amount, it is "necessary now to state the value of the things stolen, pursuant to the words of the respective statutes") (internal quotation marks omitted).

and thus [had been] adopted by the judges as necessary words of art." *Id.* at 451.[16]

Indeed, as late as 1850, in *State v. Sutcliffe*, 35 S.C.L. (4 Strob.) 372 (1850), the South Carolina court of appeals held a defendant entitled to the benefit of clergy because the indictment charged only the arson of a "house," although the arson of a "dwelling house" would have been sufficient. *Id.* at 403; *see also id.* ("Having no guide but the common law and the statutes of Henry 8, we cannot perceive, with that certainty which must be attained before the life of a fellow creature be taken, that the offence described in the indictment is included in the denial of clergy made by those statutes."). And Dalzell recounts a case from 1843 where a defendant obtained the benefit of clergy even though he had apparently done so once before, because the prior conviction had not properly been pleaded in the indictment.[17]

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In sum, the authorities from this period do not suggest that framing-era courts would have upheld a sentence merely because the prosecution had alleged and proved facts that could subject the defendant, under a different legal theory, to a maximum *possible*

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[16] *Anderson* ultimately declined to follow the traditional rule in its full vigor, based on a state statute that cured defects that were merely a matter "'of form'" and did not "'tend[] to the prejudice of the defendant.'" 5 Ark. at 453.

[17] *See* Dalzell at 259 ("The court held that the prisoner was entitled to have the allegation [of his previous crime] presented in a formal pleading so that he might join issue upon it and offer proof that he was not the same [person] or that the Attorney General had misrepresented the record. As that opportunity had not been offered to him, his application for benefit of clergy was granted and he was sentenced to be publicly whipped.").

sentence equal to or higher than the one he or she actually received. In other words, the adequacy of the indictment did not turn on whether the allegations authorized the punishment in the narrow sense adopted by the *Harris* plurality. Rather, the courts would have asked whether the facts in the indictment were sufficient to invoke the particular statutory rule on which the prosecution actually relied in seeking a particular sentence.

Facts that trigger a mandatory minimum sentence under a modern statute – like the brandishing of a firearm under § 924(c)(1)(A)(ii) – change the legal rule under which punishment is imposed. The effects of this change are similar to the historical distinction between a common-law and a statutory punishment. Even if the sentence mandated by such a statute is within (or at one end of) a range of discretionary punishment that theoretically could be imposed without the fact in question, the punishment actually is being imposed based on a judge's finding of that particular fact. The framers would have understood that such a fact, as the substantive basis for the sentence in the eyes of the parties and of the court, had to be charged in the indictment and found by the jury beyond a reasonable doubt.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

ALLEN RYAN ALLEYNE,

Petitioner,

v.

UNITED STATES.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici Curiae are the National Association of Criminal Defense Lawyers ("NACDL") and the National Association of Federal Defenders ("NAFD").

NACDL, a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes the NACDL as an affiliate organization and awards it representation in the ABA's House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving sentencing and the Sixth Amendment. In further-

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[1] Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *Amici* states that no counsel for a party authored any part of the brief, and no person or entity other than *Amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

ance of this and its other objectives, NACDL files approximately 50 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

NAFD is a nationwide, non-profit, volunteer organization, formed in 1995 in an effort to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the Constitution. Its membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD pursues its commitment to promoting fair adjudication of criminal matters by appearing as *amicus curiae* in cases of significant and recurring importance to indigent defendants.

Because the question presented by this case is regularly confronted by clients of *Amici*'s members, implicates important liberty interests protected by the Sixth Amendment, and recurs with significant frequency, *Amici* have a particular interest in this Court's resolution of the question. *Amici* submit this brief in support of petitioner, and respectfully urge the Court to reverse the Fourth Circuit's decision.

SUMMARY OF ARGUMENT

In *Apprendi* v. *New Jersey*, this Court held that the Sixth Amendment requires all "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" to be submitted to a jury and proved beyond a reasonable doubt. 530 U.S. 466, 490 (2000) (internal quotation marks omitted).

The lower courts' application of 18 U.S.C. § 924(c)(1)(A)—which authorizes sentences of "not less than 5 years" for the offense of using or carrying a firearm during and in relation to a crime of violence, sentences of "not less than 7 years" if the firearm is brandished, and sentences of "not less than 10 years" if the firearm is discharged—violated the *Apprendi* rule in one of two ways.

If the Fourth Circuit were correct that § 924(c)(1)(A) implicitly authorizes sentencing ranges of five years to life, seven years to life, and ten years to life, then the "brandishing" fact "increase[d] the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. Because this increase in the mandatory minimum "heightens the loss of liberty and represents the increased stigma society attaches to the offense," *United States* v. *O'Brien*, 130 S. Ct. 2169, 2184 (2010) (Thomas, J., concurring) (citation omitted), *Apprendi* requires that a jury find the brandishing fact beyond a reasonable doubt.

But the Fourth Circuit misinterpreted the terms of imprisonment authorized by § 924(c)(1)(A), and thus overlooked an even more straightforward violation of the *Apprendi* rule.[2] Properly construed, § 924(c)(1)(A) establishes *fixed sentencing terms* for distinct offense conduct: a fixed five-year term for a conviction for the basic offense; a fixed seven-year term if the firearm is brandished; and a fixed ten-year term if the firearm is discharged. This construc-

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[2] Other circuits have likewise misinterpreted the terms of imprisonment authorized in § 924(c)(1)(A). *See infra* n.8.

tion is supported by the statutory text, settled canons of statutory interpretation, and principles of notice and lenity.

When the statute is read faithfully to its text, the fact that the firearm was "brandished" increases the applicable fixed term from five to seven years, and *Apprendi* therefore requires this fact to be proved to a jury beyond a reasonable doubt. Indeed, even the Government agrees that if the fixed-term construction "were correct, then the 'fixed sentences' in Sections 924(c)(1)(A)(i), (ii), and (iii) would reflect varying statutory maximum sentences, and would plainly be subject to *Apprendi*." Brief for United States in Opposition 10 n.2, *Lucas* v. *United States*, No. 11-1536. This result follows regardless of whether facts that increase a mandatory minimum at the lower bound of a sentencing range must be proved to a jury.

Amici urge this Court to reverse the Fourth Circuit based on this alternative argument, which has not yet been squarely addressed by the Court and easily falls within the question presented in this case. Despite the district court's assessment that it was "fair to say [the jury] didn't find brandishing beyond a reasonable doubt," JA 45, the court nonetheless imposed a seven-year sentence on petitioner's § 924(c)(1)(A) count based on its own finding, by a preponderance of the evidence, that petitioner reasonably foresaw that his alleged accomplice would brandish a firearm. This increase in petitioner's sentence contravened the Sixth Amendment for reasons that render it irrelevant whether the *Apprendi* rule applies to facts that dictate mandatory

minimums. Here, the district judge's finding increased the statutory *maximum*.

A holding that § 924(c)(1)(A) establishes fixed-term sentences would not have an appreciable impact on criminal procedure in § 924(c)(1)(A) cases. Where there is evidence of brandishing, it takes scarcely more effort by prosecutors to prove to a jury that a defendant brandished a firearm in addition to proving that he used or carried it. And sentences pursuant to § 924(c)(1)(A) already cluster at or near the five, seven, or ten year marks.

ARGUMENT

I. Section 924(c)(1)(A) Creates Three Fixed-Term Sentences.

Even if the Court were not inclined to hold that facts dictating a mandatory-minimum sentence are subject to *Apprendi*, it should still reverse the Fourth Circuit. *Apprendi* undoubtedly requires a jury to find facts that subject a defendant to a higher fixed-term sentence. For purposes of 18 U.S.C. § 924(c)(1)(A), the brandishing of a firearm is just such a fact: It increases the sentence that a defendant faces from a fixed five-year term to a fixed seven-year term. The Fourth Circuit erred when it held that this fact could be found by a judge.

A. The Text of § 924(c)(1)(A) Establishes Fixed-Term Sentences, Not Sentencing Ranges.

The text of § 924(c)(1)(A) imposes three separate fixed-term sentences: a five-year sentence for the

basic offense; a seven-year sentence if the firearm is brandished; and a ten-year sentence if the firearm is discharged. These fixed terms are mandatory and consecutive to any underlying offense. Congress prohibited sentencing courts from imposing a lesser sentence by expressly requiring that a convicted defendant "shall . . . be sentenced to a term of imprisonment of *not less than*" five, seven, or ten years. 18 U.S.C. § 924(c)(1)(A)(i)-(iii) (emphasis added).

Congress did not, however, authorize a sentence in excess of the statutory fixed terms for these offenses. There are numerous criminal statutes in the U.S. Code that authorize a range of permissible sentences. They accomplish this objective by expressly identifying the upper and lower bound of the sentencing range. *See, e.g.*, 18 U.S.C. § 844(f)(1) ("not less than 5 years and not more than 20 years");[3] 21 U.S.C. § 841(b)(1)(A) ("such person [convicted of certain drug crimes] shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life").[4] As this statutory authority well

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[3] For additional statutes creating sentencing ranges bounded by a specific minimum and maximum sentence, *see, e.g.*, 2 U.S.C. § 390 ("imprisonment for not less than one month nor more than twelve months"); 7 U.S.C. § 15b(k) ("imprisonment for not less than 30 days nor more than 90 days"); *see also* 16 U.S.C. §§ 413, 414; 18 U.S.C. §§ 844(f)(1)-(3), 844(i); 21 U.S.C. §§ 212, 844(a), 960(b)(2); 46 U.S.C. § 58109.

[4] For additional statutes creating sentencing ranges bounded by a specific minimum and a maximum of life imprisonment, *see, e.g.*, 18 U.S.C. § 33(b) ("imprisoned for any term of years not less than 30, or for life"), *id.* § 1591(b)(1) ("imprisonment for any term of years not less than 15 or for life"); *see also* 18 U.S.C. §§ 175c(c)(1), 175c(c)(2), 225(a), 1121(b)(1), 1591(b)(2), 1658(b),

establishes, Congress knows how to create a range of permissible sentences, including sentencing ranges with a maximum of a fixed term of years or even life imprisonment. But it pointedly did not do any of those things in § 924(c)(1)(A), which does not state any upper bounds that would create sentencing ranges. *See Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (it is the "duty" of courts "to refrain from reading a phrase into the statute when Congress has left it out").

Indeed, the balance of § 924 establishes that Congress could not have meant to forgo upper limits for the sentences in § 924(c)(1)(A), thereby authorizing sentences of up to life imprisonment. That is because Congress *explicitly* authorized "life" sentences for those offenses it thought warranted such a penalty. For example, § 924(c)(5)(B)(i) expressly authorizes a "life" sentence for conduct involving armor piercing ammunition that results in death. *See also* 18 U.S.C. § 924(j)(1) (authorizing "life" sentence for defendants who cause the murder of a person in the course of a violation of § 924(c)); 18 U.S.C. § 924(o) (authorizing "life" sentence for defendants who conspire to commit an offense under § 924(c) with a firearm that is a machinegun or destructive device, or is equipped with a silencer or muffler).[5] Similarly, outside of § 924, literally dozens

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2241(c), 2251(e), 2251A(a)-(b), 2252A(g), 2332g(c)(1), 2332g(c)(2), 2332h(c)(1), 2332h(c)(2), 2423(a), 3559(f)(1), 3559(f)(2), 3559(f)(3); 21 U.S.C. §§ 841(b)(1)(B), 841(b)(1)(C), 848(a), 960(b)(1); 42 U.S.C. § 2272(b).

[5] *Cf.* 18 U.S.C. § 924(c)(1)(C)(ii) (imposing a sentence of "imprisonment for life" on certain repeat offenders whose crimes

of provisions authorize a sentencing range bounded by a mandatory minimum term and life imprisonment, all by expressly stating that the upper boundary is imprisonment for "life."[6] But as members of this Court have recognized, § 924(c)(1)(A) "mentions nothing about life." Tr. of Oral Arg. 13, *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010) (No. 08-1569) (questioning by Justice Scalia).[7]

The text of § 924(c) makes clear that Congress knows how to authorize a life sentence. It decided not to do so for § 924(c)(1)(A). And "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

Departing from § 924(c)(1)(A)'s plain text, the Government and courts of appeals have concluded that § 924(c)(1)(A) *implicitly* authorizes sentencing

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involve machineguns, destructive devices, silencers, or mufflers).

[6] *See supra* n.4.

[7] *See also* Tr. of Oral Arg. 13, *O'Brien* (questioning by Justice Scalia) ("[W]here is the life sentence maximum, by the way? . . . I'm reading through, and there's—it mentions nothing about life. . . . And if it mentions nothing about life, then these are not mandatory minimums. To the contrary, they are—they are new maximums."); *id.* at 14-15 (questioning by Justice Ginsburg) ("[B]ut where do you get the maximum?"); *id.* at 15 (questioning by Justice Sotomayor) ("Is there a Sixth Amendment problem . . . with reading a statute to provide for an unlimited maximum when Congress hasn't specified it . . . ?").

ranges of up to life imprisonment. The position of the government is that although the statute contains "no stated maximum" of life imprisonment, the "*implied* maximum term . . . is life." Tr. of Oral Arg. 15, *O'Brien* (emphasis added). The courts of appeals that have confronted this question generally employ the same rationale.[8]

The argument that § 924(c)(1)(A) authorizes a life sentence relies on the phrase "not less than." But that phrase does not impliedly authorize a sentence up to life imprisonment. The "not less than" language is best understood as intended to establish a fixed term while at the same time expressly conveying the admonition that lesser sentences are not permissible. That is exactly how Justice Curtis construed a federal statute imposing a penalty of "not less than one hundred dollars" that came before him while he rode circuit in the District of Massachusetts. *See Stimpson* v. *Pond*, 23 F. Cas. 101, 102 (C.C. Mass. 1855) (construing Act of August 29, 1842, § 5). Justice Curtis held that this "anomalous provision" did

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[8] *See, e.g.*, *United States* v. *Lucas*, 670 F.3d 784, 796 (7th Cir. 2012) (holding that § 924(c)(1)(A) "implicitly authorized district courts to impose a sentence up to a maximum of life imprisonment"); *United States* v. *Shabazz*, 564 F.3d 280, 289 (3d Cir. 2009) (same); *United States* v. *Johnson*, 507 F.3d 793, 798 (2d Cir. 2007) (recognizing that "18 U.S.C. § 924(c)(1)(A) does not specify a maximum sentence," but nonetheless holding that "the maximum sentence under that statute is life imprisonment"); *United States* v. *Sias*, 227 F.3d 244, 246 (5th Cir. 2000) ("By implication, Congress left open the ceiling of sentences imposed under § 924(c).").

> not authorize the infliction of a greater penalty than one hundred dollars. Power to inflict a particular penalty must be conferred by congress in such terms as will bear a strict construction. The only power expressly given by this act is to impose a penalty of not less than one hundred dollars. . . . The terms of the act do not authorize the infliction of a penalty greater than one hundred dollars.

Ibid.

Justice Curtis specifically rejected the "authorization by implication" theory that the Government now presses in the context of § 924(c)(1)(A). "[M]ere implication can hardly ever be safe ground on which to rest a penalty, and when penalties of unlimited magnitude are the subjects of the implication, the danger of making it, and the improbability of its correctness, are proportionably increased." *Ibid.*; *see also Lin* v. *United States*, 250 F. 694, 695 (8th Cir. 1918) (construing a federal statute authorizing "imprisonment for not less than five years," and holding that the "statute fixe[d] a certain punishment of five years" and did not permit a sentence of "life imprisonment").

Nor does the history of § 924(c) weigh against the fixed-term construction. Prior to 1998, § 924(c) provided that a defendant convicted of the basic offense of using or carrying a firearm during and in relation to a crime of violence "shall . . . be sentenced to imprisonment for five years." 18 U.S.C. § 924(c)(1)

(1993). It did not address offenses involving brandishing or discharging a firearm. *See ibid.* In 1998, Congress restructured the statute to create three separate terms: "not less than 5 years" for the basic offense; "not less than 7 years" for brandishing a firearm"; and "not less than 10 years" for discharging a firearm. 18 U.S.C. § 924(c)(1)(A).

The addition of this hortatory "not less than" language amounts to a belt-and-suspenders technique, designed to avoid any ambiguity as to whether a court could impose a sentence lower than the specified term. That concern was not an idle one: prior to the 1998 amendments, district courts had repeatedly imposed sentences of *less than* five years on criminal defendants convicted of § 924(c) violations. *See, e.g.*, *United States* v. *Maddox*, 48 F.3d 791, 795 (4th Cir. 1995) (district court sentenced defendant "to five years probation, notwithstanding the five-year mandatory minimum sentence required by his conviction for using a firearm during a crime of violence under 18 U.S.C. § 924(c)"); *United States* v. *Higgs*, 1991 WL 23580, at *1 (4th Cir. Feb. 28, 1991) (district court "acknowledged the mandatory provision of a five year sentence" but imposed three-year sentence because "'Congress in enacting § 924(c) may not have adequately taken into consideration certain factors'").[9]

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[9] Accordingly, there is no need—as some courts have suggested—to construe the "not less than" phrase "to mean 'not more than.'" *United States* v. *Dorsey*, 677 F.3d 944, 957 (9th Cir. 2012). In the context of Section 924(c)(1)(A), "not less than" means what it says: it reinforces the statutory prohibition on sentences *shorter* than five, seven, or ten years.

Congress's purpose of ensuring fixed-term sentences that are binding on district courts was reflected in the floor debate. One of the bill's original sponsors explained that the bill would "[p]rovide a seven year sentence for 'brandishing'" and "[r]aise the penalty to ten years if the gun is discharged." 144 CONG. REC. S12671 (1998) (Sen. DeWine). The presidential signing statement also reflected this purpose. *See* Presidential Statement on Signing S. 191, 34 WEEKLY COMP. PRES. DOC. 46, at 2309 (Nov. 13, 1998) ("[T]he bill I sign today will add 5 years of hard time to sentences of criminals who even possess firearms when they commit drug-related or violent crimes. Brandishing the firearm will draw an extra 7 years; firing it, another 10.").

As Justice Scalia previously observed from the bench, the current version of § 924(c)(1)(A) "says there will be added to whatever the sentence is for the crime of violence or the drug trafficking crime—there will be added to that sentence. Then it says you'll add 7 years [for brandishing a firearm]. . . . Those are not mandatory minimums. Those are add-ons to the sentence provided by the substantive crime to which (c)(1)(A) refers. That way, the whole thing makes sense." Tr. of Oral Arg. 16, *O'Brien*.

The sentencing-range interpretation, by contrast, does not make sense. It entails that Congress deliberately increased the maximum penalty for the crime of using or carrying a firearm during and in relation to a crime of violence from five years to life in prison, but chose to do so *sub silentio*, via the circuitous route of foreclosing sentences shorter than five years. This theory of life imprisonment by implication is made

more improbable considering that *Amici* have found no mention in the legislative history of any intent to create new sentencing ranges extending to life in prison. *See, e.g.*, H.R. REP. NO. 105-344 (1997); *see generally Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 63-64 (2004) (rejecting proposed interpretation of the Truth in Lending Act following congressional amendment where "[t]he text does not dictate this result" and "there is scant indication Congress meant to" effect it). It would be passing strange for Congress to authorize a sentence of life imprisonment, "the second most severe penalty permitted by law," *Graham* v. *Florida*, 130 S. Ct. 2011, 2027 (2010) (internal quotation marks and citation omitted), without including the word "life" in the statute or referencing it anywhere in the legislative history.[10]

Moreover, the sentencing-range interpretation is contrary to the canon that courts must "construe statutes, where possible, so as to avoid rendering superfluous any parts thereof." *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112 (1991). If the phrase "not less than X years" were sufficient, by itself, to create a sentencing range of X years to life, it would render superfluous the explicit grant of authority for "life" imprisonment in dozens of federal sentencing statutes. For example, the words "or more than life" would be unnecessary in 21 U.S.C.

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[10] Indeed, applying the Government's faulty logic, one could equally argue that the statute implicitly authorizes a sentence of death—because by providing that sentences must be "not less than 5 years," Congress implicitly left any more severe punishment on the table.

§ 841(b)(1)(C), which creates a sentencing range for certain crimes involving controlled substances of "not less than twenty years or more than life." *See also supra* n.4 (collecting statutes). That is reason enough to reject the Government's interpretation, for it is "a cardinal principle of statutory construction that [courts] must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks and citation omitted).

The countervailing surplusage argument—that a "fixed term" interpretation is impermissible because it would render the words "not less than" superfluous—is unpersuasive for three reasons. First, the history establishes that these words *do* serve a purpose by reinforcing the prohibition against shorter sentences. *See supra* 11. Second, even if the fixed-term interpretation would render superfluous the words "not less than" in a few statutory provisions,[11] the sentencing-range interpretation would render superfluous a comparatively greater amount of language in other federal statutes.[12] Because "the canon against surplusage merely favors that interpretation which *avoids* surplusage," *Freeman* v. *Quicken Loans, Inc.*, 132 S. Ct. 2034, 2043

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[11] *See* 18 U.S.C. §§ 924(c), 924(e)(1), 929(a)(1), 1201(g)(1), 2113(e), 2261(b)(6), 3600(f)(3); 21 U.S.C. §§ 859(a)-(b), 860(a).

[12] *See, e.g.*, 18 U.S.C. §§ 33(b), 175c(c)(1), 175c(c)(2), 225(a), 1121(b)(1), 1591(b)(1), 1591(b)(2), 1658(b), 2241(c), 2251(e), 2251A(a)-(b), 2252A(g), 2332g(c)(1), 2332g(c)(2), 2332h(c)(1), 2332h(c)(2), 2423(a), 3559(f)(1), 3559(f)(2), 3559(f)(3); 21 U.S.C. §§ 841(b)(1)(A), 841(b)(1)(B), 841(b)(1)(C), 848(a), 960(b)(1); 42 U.S.C. § 2272(b).

(2012), that comparison weighs in favor of the fixed-term interpretation. Third, in the event the Court concludes that these offsetting surplusage arguments result in a statutory ambiguity, that ambiguity must be resolved in favor of the fixed-term interpretation under the rule of lenity, as explained below. *See infra* at 15-17.

Finally, that some authorities have characterized § 924(c)(1)(A) as creating "minimum" or "mandatory minimum" sentences does not weigh against the fixed-term interpretation. *See, e.g.*, *Abbott* v. *United States*, 131 S. Ct. 18, 22-23 (2010) ("The minimum prison term for the offense described in § 924(c) is five years."); *Dean* v. *United States*, 556 U.S. 568, 570 (2009) ("5-year mandatory minimum sentence"); U.S. SENTENCING GUIDELINES MANUAL § 2K2.4, cmt. n.2(A) (2011) (describing § 924(c) as "provid[ing] mandatory minimum terms of imprisonment"); *cf.* 18 U.S.C. § 924(c)(1)(A) (referring to "minimum sentence[s]" outside of § 924(c)(1)(A)). The five-, seven-, and ten-year sentences authorized by § 924(c)(1)(A) are emphatically the "minimum" sentence permitted by the statute—the "not less than" language guarantees that. The fact that the statute indisputably creates a "mandatory minimum" sentence does not, however, require courts to imply a different unbounded maximum sentence. Here, the minimum and maximum have simply converged.

B. The Rule of Lenity Compels the Fixed-Term Interpretation.

Even if the Court concludes that the statute is ambiguous as to the available sentence, the rule of

lenity would direct the adoption of the fixed-term interpretation. The rule of lenity "requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States* v. *Santos*, 553 U.S. 507, 514 (2008). It applies not only to disputes over the substantive scope of criminal statutes, but also to "questions about the severity of sentencing," *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992), because it is grounded in "'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting HENRY J. FRIENDLY, MR. JUSTICE FRANKFURTER AND READING OF STATUTES, IN BENCHMARKS 196, 209 (1967)); *see also R.L.C.*, 503 U.S. at 307-11 (Scalia, J., concurring, joined by Kennedy, J., and Thomas, J.) (agreeing that rule of lenity applies to sentencing statutes).[13]

Under the rule of lenity, "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Simpson* v. *United States*, 435 U.S. 6, 15 (1978) (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1978)). Section 924(c)(1)(A) plainly lacks the sort of "clear and definite legislative directive" that the Court requires

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[13] *R.L.C.* is one of numerous cases where the Court has recognized that the lenity rule applies to sentencing questions. *See also Bifulco* v. *United States*, 447 U.S. 381, 387 (1980); *Busic* v. *United States*, 446 U.S. 398, 406 (1980); *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979); *Ladner* v. *United States*, 358 U.S. 169, 178 (1958); *Prince* v. *United States*, 352 U.S. 322, 328 (1957); *Bell* v. *United States*, 349 U.S. 81, 83 (1955).

before it accedes to an interpretation that serves "to increase or multiply punishments." *Simpson*, 435 U.S. at 15-16; *see also Bass*, 404 U.S. at 348 (requiring Congress to speak "plainly and unmistakably" in favor of harsher construction of statute). Indeed, without any express textual indication or legislative history to suggest that Congress intended to increase the maximum available sentence from five years to life, the implied life-term "interpretation can be based on no more than a guess as to what Congress intended," and must be rejected under the rule of lenity. *Simpson*, 435 U.S. at 15.

C. *Stare Decisis* Presents No Obstacle to the Fixed-Term Interpretation.

Because this Court has not directly confronted the question whether § 924(c)(1)(A) creates fixed-term sentences, *stare decisis* presents no obstacle to resolving the instant case on this ground. Where the Court has "never squarely addressed [an] issue," and has "at most assumed" the answer to the issue, it remains "free to address the issue on the merits" notwithstanding principles of *stare decisis*. *Brecht* v. *Abrahamson*, 507 U.S. 619, 631 (1993); *see Monell* v. *Dep't of Social Servs. of City of N.Y.*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring) ("I think we owe somewhat less deference to a decision that was rendered without benefit of a full airing of all the relevant considerations."). In particular, "the relevant demands of *stare decisis* do not preclude considering, for the first time thoroughly and in the light of the best available evidence of congressional purpose, a statutory interpretation which started as

an unexamined assumption." *Monroe* v. *Pape*, 365 U.S. 167, 220-21 (1961) (Frankfurter, J., dissenting).

At most, this Court's prior cases concerning § 924(c)(1) advance the "unexamined assumption" that the statute creates sentencing ranges rather than fixed terms—an assumption that does not warrant deference under principles of *stare decisis*. None of the parties in *Harris* v. *United States*, 536 U.S. 545 (2002), nor the lower court, advanced the argument that § 924(c)(1) created fixed terms—or even contemplated that possibility. Rather, the briefs for both parties in *Harris* (and the *amicus* brief filed by the NACDL) simply assumed that the statute authorized sentencing ranges of up to life imprisonment. *See, e.g.*, Brief for Petitioner 29, 31-32; Brief for United States 4, 6, 10-11, 13; Brief for *Amici Curiae* The Cato Institute and NACDL 4, 24. And the question presented in *Harris* explicitly assumed that the seven-year term created by § 924(c)(1)(A)(ii) was a "mandatory minimum" rather than a fixed term.[14]

It is not surprising, then, that the Court in *Harris* operated on the premise that the provisions of § 924(c)(1)(A) "alter only the minimum," and that "the judge may impose a sentence well in excess of seven years," 536 U.S. at 554, or that the dissent similarly assumed that the statute created a sentencing range

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[14] The question presented was worded as follows: "Given that a finding of 'brandishing,' as used in 18 U.S.C. § 924(C)(1)(A), results in an increased mandatory minimum sentence, must the fact of 'brandishing' be alleged in the indictment and proved beyond a reasonable doubt?" Brief for Petitioner i, *Harris* v. *United States*, No. 11-1536.

of "five years to life in prison" for the basic offense and "seven years to life imprisonment" for brandishing, *id.* at 575-76 (Thomas, J., dissenting). These were assumptions only; the Court never squarely analyzed whether the statute is better read as creating fixed terms. Thus, these conclusory statements are not eligible for *stare decisis* treatment. *See Brecht*, 507 U.S. at 631.

Nor did the Court squarely decide the fixed-term question in *United States* v. *O'Brien*, 130 S. Ct. 2169 (2010). There again, the question presented assumed that § 924(c)(1) created "a series of escalating mandatory minimum sentences,"[15] and the parties' briefs assumed that the statute could be read to create ranges extending from mandatory minimums up to life imprisonment, *see, e.g.*, Brief for United States 4; Brief for Respondent O'Brien 9, 45; Brief for Respondent Burgess 2. Although several Justices raised the fixed-term issue *sua sponte* from the bench during oral argument, *see supra* 8 & n.7, the *O'Brien* opinion did not address that question, and merely reiterated the parties' mutual assumption that "[t]he

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[15] The Government styled the question presented in *O'Brien* as follows: "Section 924(c)(1) of Title 18 of the United States Code provides for a series of escalating mandatory minimum sentences depending on the manner in which the basic crime (*viz.*, using or carrying a firearm during and in relation to an underlying offense, or possessing the firearm in furtherance of that offense) is carried out. The question presented is whether the sentence enhancement to a 30-year minimum when the firearm is a machinegun is an element of the offense that must be charged and proved to a jury beyond a reasonable doubt, or instead a sentencing factor that may be found by a judge by a preponderance of the evidence." Brief for the United States i.

current statute provides only mandatory minimums." 130 S. Ct. at 2177. In response to the Government's argument that § 924(c)(1)(A) implies a maximum sentence of life imprisonment, the Court observed only that this was "perhaps" correct. *Ibid.* To the extent that any statements in *O'Brien* can be read as weighing against the fixed-term interpretation—and that is debatable—they are hardly the sort of "square[]" decision that triggers *stare decisis*. *Brecht*, 507 U.S. at 631.[16]

The *stare decisis* analysis is not altered by the fact that this is a statutory question. To be sure, "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation." *Hilton* v. *S. Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991) (internal quotation marks and citation omitted). But before a Court may "stand by decided matters," the matters must be decided. *Stare decisis* has no place when this Court resolves for the first time a statutory question that it has not genuinely examined in prior cases. Moreover, because this Court has never squarely tackled whether § 924(c)(1)(A) creates fixed terms, there is no reason to believe that Congress has

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[16] For similar reasons, the Court's passing statement that § 924(e) creates "a mandatory minimum sentence of 15 years and a maximum of life in prison without parole" in *Custis* v. *United States*, 511 U.S. 485, 487 (1994), does not foreclose the fixed-term interpretation. The question before the Court in *Custis* had nothing to do with the proper interpretation of § 924(e). Rather, the Court considered "whether a defendant in a federal sentencing proceeding may collaterally attack the validity of previous state convictions that are used to enhance his sentence under [§ 924(e)]." *Ibid.*

placed any reliance on the statements in *Harris* or *O'Brien* mentioned above.

D. Petitioner's Sentence Violates the Sixth Amendment.

Because § 924(c)(1)(A) creates a fixed sentence of five years for the basic offense of using or carrying a firearm during and in relation to a crime of violence, and a fixed sentence of seven years for brandishing the firearm, petitioner's sentence in this case violates the Sixth Amendment. Whatever the proper reach of the *Apprendi* rule, it is now beyond dispute that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Here, defendant's prescribed statutory sentence was increased from five to seven years based on a factual finding of the trial court, not the jury. The Sixth Amendment required the jury to find that fact beyond a reasonable doubt before petitioner could be subjected to a seven-year sentence.

The Government agrees with this analysis. In opposing the petition for certiorari in *Lucas* v. *United States*, No. 11-1536, the Government acknowledged that if the "fixed-term" construction "were correct, then the 'fixed sentences' in Sections 924(c)(1)(A)(i), (ii), and (iii) would reflect varying statutory maximum sentences, and would plainly be subject to *Apprendi*—resolving the *Alleyne* petitioner's claim that his brandishing should have been proven to a jury beyond a reasonable doubt." Brief for United States in Opposition 10 n.2, *Lucas*.

The fact that the Sixth Amendment issue would not be debatable if § 924(c)(1)(A) were construed to set fixed terms counsels strongly in favor of this construction. It is this Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez* v. *United States*, 490 U.S. 858, 864 (1989). How the Sixth Amendment should apply to § 924(c)(1)(A) if it is construed to create sentencing ranges with mandatory minimums has divided this Court, with two sitting Justices in *Harris* concluding that the *Apprendi* rule does not require the fact of brandishing to be proved to a jury, *see* 536 U.S. at 556-68 (plurality opinion of Kennedy, J. joined by Scalia, J.), two sitting Justices taking the opposite position, *see id.* at 580-83 (Thomas, J., dissenting joined by Ginsburg, J.), and one sitting Justice recently signaling that *Harris* may have been wrongly decided, *see O'Brien*, 130 S. Ct. at 2183 n.6 (Stevens, J., concurring) (quoting statement of Breyer, J.). Because the fixed-term interpretation of § 924(c)(1)(A) is a reasonable one that would avoid this constitutional debate, the canon of constitutional avoidance weighs in favor of its adoption.

E. The Court Should Resolve the Fixed-Term Question That This Case Implicates.

The Court should resolve this case under the fixed-term interpretation because the proper construction of § 924(c)(1)(A) is fairly included within the question presented. Rule 14.1(a) allows this Court to consider the "questions set out in the

petition," as well as all questions "fairly included therein." Here, the question presented was: "Whether this Court's decision in *Harris* v. *United States*, 536 U.S. 545 (2002), should be overruled." *Harris* held that the *Apprendi* rule did not apply to the fact of brandishing in § 924(c)(1)(A). One reason *Harris* was wrongly decided is that *Apprendi* applies to facts that dictate mandatory-minimum sentences. *Contra Harris*, 536 U.S. at 568. Another reason that *Harris* was wrongly decided is that § 924(c)(1)(A) establishes fixed-term sentences—contrary to the *Harris* Court's unexamined assumption that it creates sentencing ranges—and thus a finding of "brandishing" is subject to the *Apprendi* rule because it raises the statutory maximum from five to seven years.[17] Both arguments require *Harris* to be overruled, and both are properly before this Court. *See Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("'Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'") (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)) (alteration omitted).[18]

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[17] *See* Brief for United States in Opposition 8, *Lucas* v. *United States*, No. 11-1536 (describing the *Harris* Court's assumption that § 924(c)(1)(A) created sentencing ranges as "essential to the Court's constitutional holding").

[18] The Court's general reluctance towards addressing an argument not raised below should not give the Court pause here, where the argument relates to a pure question of law that has already been addressed by multiple courts of appeals. And, even if the Court were concerned about addressing the fixed-term interpretation in this case, it could grant one of the two pending petitions for certiorari that raise the same question.

II. The Fixed-Term Interpretation Would Not Disrupt the Criminal Justice System.

The fixed-term construction of § 924(c)(1)(A) that *Amici* urge would not disrupt the criminal justice system. It is unlikely to work any major change in the sentences imposed on offenders who brandished a firearm during a qualifying offense, or to unduly complicate prosecutions for § 924(c)(1)(A) offenses.

A. Sentences for § 924(c)(1)(A) Violations Already Cluster at Five, Seven, and Ten Years.

It is the experience of *Amici* that actual sentences imposed for § 924(c)(1)(A) violations already hew closely to the five-, seven-, and ten-year terms set out in the statute. As Justice Thomas observed in *Harris*, "the sentence imposed when a defendant is found only to have 'carried' a firearm 'in relation to' a drug trafficking offense appears to be, almost uniformly, if not invariably, five years." 536 U.S. at 578 (Thomas, J., dissenting). Likewise, "those found to have brandished a firearm typically, if not always, are sentenced only to 7 years in prison while those found to have discharged a firearm are sentenced only to 10 years. *Ibid.* (citing United States Sentencing Commission, 2001 Datafile, USSCFY01, Table 1).

More recently, in *O'Brien*, the Court saw no evidence of sentences that substantially exceeded the

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See Lucas v. *United States*, No. 11-1536; *Dorsey* v. *United States*, No. 12-6571.

fixed terms specified in the statute. It observed that "[n]either the Government nor any party or *amicus* has identified a single defendant whose conviction under § 924 for possessing or brandishing a nonspecific firearm led to a sentence approaching the 30-year sentence that is required when the firearm is a machinegun." 130 S. Ct. at 2177. Rather, the respondents in that case advised the Court, "without refutation, that most courts impose the mandatory minimum of 7 years' imprisonment for brandishing a nonspecific weapon and the longest sentence that has come to the litigants' or the Court's attention is 14 years." *Ibid.*

B. Proving "Brandishing" and "Discharge" to a Jury Would Not Unduly Burden Prosecutors.

Requiring the Government to prove to a jury that a firearm was "brandished" or "discharged" would not significantly complicate § 924(c)(1)(A) prosecutions.

As an initial matter, to convict a defendant of *any* violation of § 924(c)(1)(A), the Government must prove to a jury beyond a reasonable doubt that a firearm was "use[d] or carrie[d]" in connection with the crime of violence or drug trafficking crime. In the mine run of cases, once the Government has put on evidence of this conceded element of the crime, it requires minimal additional effort to prove brandishing or discharge. A jury can find that a defendant carried a firearm under § 924(c) based solely on eyewitness testimony. *See Parker* v. *United States*, 801 F.2d 1382, 1383-86 (D.C. Cir. 1986) (Scalia, J.). To take one example, if a witness

testifies that she saw the defendant carjack a vehicle while carrying a handgun, it only takes a few additional questions to establish whether she also saw the defendant brandish or discharge the handgun during the offense. What is more, even under existing law it is common for prosecutors to put on such evidence as part of the narrative of their case.

In addition, even though it may be unnecessary to do so under *Harris*, it is not uncommon for the Government to charge brandishing or discharge as an element in the indictment, and to seek to prove these facts to the jury beyond a reasonable doubt. *See, e.g.*, *United States* v. *Lindsey*, 634 F.3d 544, 544-45 (9th Cir. 2011) (indictment charged defendant with brandishing a firearm under § 924(c)(1)(A)(ii), and jury found defendant guilty of that count). That is exactly what happened in the instant case: the indictment alleged brandishing, JA 15; the district court instructed the jury on brandishing, JA 21; and the verdict form explicitly asked the jury to determine whether petitioner "[b]randished a firearm in connection with the crime of violence," JA 40. Indeed, publications available on the Department of Justice website titled "Summary of Federal Firearm Laws" and "Fed Facts: The Real Deal" characterize "[b]randishing" a firearm in violation of § 924(c) as a unique "offense."[19]

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[19] *See* http://www.justice.gov/usao/me/docs/Summary%20of%20Federal%20Firearms%20Laws%20-%202010.pdf, at 7-8 (last visited Nov. 19, 2012); http://www.justice.gov/usao/ut/psn/documents/fedfacts%20for%20utah_web.pdf, at 1 (last visited Nov. 19, 2012).

Finally, prosecutors already must prove this type of fact to juries when prosecuting other criminal offenses. Section 924(c)(4) defines "brandish" as "to display all or part of the firearm," and numerous provisions of Title 18 include the "display" of an object as an explicit element of a criminal offense. For example, § 707 creates criminal liability for "[w]hoever, with intent to defraud, wears *or displays* the sign or emblem of the 4-H clubs . . . for the purpose of inducing the belief that he is a member of, associated with, or an agent or representative of the 4-H clubs." 18 U.S.C. § 707 (emphasis added).[20] If prosecutors must prove to a jury that an object has been "display[ed]" to convict a defendant of the relatively trifling offense proscribed by § 707, surely they can prove that a firearm has been displayed in connection with a crime of violence or drug trafficking crime for purposes of § 924(c)(1)(A). Similarly, prosecutors already must prove "discharge" as an element of § 922(q)(3), which makes it a crime for "any person, knowingly or with reckless disregard for the safety of another, to *discharge* or attempt to discharge a firearm . . . at a place that the person knows is a school zone." 18 U.S.C. § 922(q)(3) (emphasis

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[20] *See also* 18 U.S.C. § 706 ("Whoever wears *or displays* the sign of the Red Cross . . . ."); *id.* § 706a ("Whoever wears *or displays* the sign of the Red Crescent . . . ."); *id.* § 709 ("Whoever falsely advertises or represents, or publishes *or displays* any sign, symbol or advertisement reasonably calculated to convey the impression that a nonmember bank, banking association, firm or partnership is a member of the Federal reserve system . . . ."); *id.* § 713(a) ("Whoever knowingly *displays* any printed or other likeness of the great seal of the United States . . . .") (emphasis added throughout).

added).[21] And numerous state statutes treat "brandishing" or "discharge" as elements of independent crimes, which must be proven to a jury. *See* Brief for Petitioner 48-49.

In short, adopting the "fixed-term" interpretation of § 924(c)(1)(A) will not substantially affect the sentences imposed on defendants who have brandished or discharged a firearm, nor will it create significant hurdles for prosecutors in cases where firearms were brandished or discharged. It will, however, ensure that prosecutions under § 924(c)(1)(A) comply with the Sixth Amendment and that criminal defendants are not sentenced to terms beyond those authorized by Congress.

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[21] *See also* 18 U.S.C. § 3559(c)(2)(A) (defining "assault with intent to commit rape" as "an offense that has *as its elements* engaging in physical contact with another person or using *or brandishing* a weapon against another person with intent to commit aggravated sexual abuse or sexual abuse") (emphasis added).

CONCLUSION

For the reasons stated above and in the petitioner's brief, the judgment of the Fourth Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

No. 11-9335

IN THE

Supreme Court of the United States

ALLEN RYAN ALLEYNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for Fourth Circuit

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QUESTION PRESENTED

Whether this Court's decision in *Harris v. United States*, 536 U.S. 545 (2002), should be overruled.

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BRIEF OF NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER AND URGING REVERSAL

INTEREST OF *AMICUS CURIAE*

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 240 lawyers (including many former federal prosecutors) whose principal area of practice is the defense of criminal cases in the federal courts of New York.[1] NYCDL's mission includes protecting and ensuring individual rights guaranteed by the U.S. Constitution and by rule of law through education; supporting and advancing the criminal defense function by enhancing the quality of defense representation; taking positions on important defense issues; promoting study and research in the criminal justice system; and promoting the proper administration of criminal justice.

As *amicus curiae*, NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs in *United States v. Booker*, 543 U.S. 220 (2005), and *Rita v. United States*, 551 U.S. 338 (2007), were cited by the Court or concurring justices. NYCDL also submitted briefs in *Claiborne v. United States*, 551 U.S. 87 (2007) and *Gall v. United States*, 552 U.S. 38 (2007), and has an interest in ensuring

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[1] This brief is filed with the written consent of the parties, which is on file with the Clerk of Court. Pursuant to Sup. Ct. R. 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

that every criminal defendant in the United States receives the protections guaranteed to him or her by the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution. In particular, NYCDL has an interest in ensuring a uniform sentencing approach that allows all factors that relate to the offense at issue and that may increase a defendant's sentence—whether a minimum or a maximum—to be found by a jury beyond a reasonable doubt. At the same time, NYCDL has an interest in sentencing efficiency and in preserving the traditional discretion that judges retain with respect to assessing characteristics particular to an individual defendant.

To assist this Court, this *amicus* brief in support of the Petitioner provides two concrete examples demonstrating that any practical concerns about answering the question presented in the affirmative will not produce the kinds of adverse practical effects that have troubled certain Justices. Rather, these examples show that when state and federal courts have extended this Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to mandatory minimum sentences, the criminal justice system continues to function smoothly. NYCDL also presents this brief to explain that any remaining concerns about the effects of *Apprendi* on the criminal justice system can be further ameliorated by distinguishing between two types of facts: facts specific to the *offense* and facts specific to the *offender*. As explained below, while the former must be alleged in an indictment and found by a jury beyond a reasonable doubt, the latter can continue to be found by a sentencing judge by a preponderance of the evidence.

SUMMARY OF ARGUMENT

Harris v. United States, 536 U.S. 545 (2002), along with its predecessor *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), should be overruled. Neither *Harris* nor *McMillan* can be reconciled with this Court's modern Fifth and Sixth Amendment jurisprudence. *Harris* allows a sentencing judge to find, by a preponderance of the evidence, facts that increase the range of penalties that a criminal defendant will face. That holding stands in sharp contrast with this Court's reasoning in *Apprendi*, which prevents states from "defining away" facts that expose a defendant to harsher punishment and greater societal stigma. In practice, whether the enhanced punishment results from a raised "floor" or a higher "ceiling" makes no difference to the defendant whose liberty is further curtailed. And because *stare decisis* concerns are at their nadir when dealing with questions of Constitutional law, this Court should not hesitate to fully apply *Apprendi*'s logic to mandatory minimums such as the one faced by Petitioner, and thereby overturn *Harris* and *McMillan*.

As this Court has applied *Apprendi*'s holding over the last decade, several Justices have expressed concerns about the rule's potential impact on trials and sentencing. As NYCDL's experience in New York federal and state courts shows, any such effects will be minimal. New York's federal courts, for example, have operated for seven years under a paradigm for drug offenses that substantially parallels the structure all courts would face should this Court overturn *Harris*. Practitioners there have been able to apply *Apprendi*'s rule to drug offenses with relative ease: from the indictment to the jury instructions or to the plea allocution, New York prosecutors and defense

lawyers are able to address any facts that expose defendants not just to increased maximums, but also to increased minimums. Similarly, criminal defense attorneys in New York state courts regularly confront situations where a jury is required to find facts that trigger a mandatory minimum sentence, without apparent difficulty or inefficiency. These experiences buttress Petitioner's argument that "there are no practical impediments to overruling *Harris*." Pet. Br. 42.

Moreover, any of the enduring practical concerns identified by certain Justices can be addressed by adopting an approach to overruling *Harris* that distinguishes between facts that are specific to the *offense* and facts that are specific to the *offender*. The Constitution's text requires that all facts relating to the alleged "crimes" at issue must be stated in the indictment and presented to the jury, which the Due Process clause requires to be proven beyond a reasonable doubt. To avoid a requirement that aggravating facts concerning an offender's past be presented to the jury if such offender-specific characteristics implicate a mandatory minimum, the Court should draw a line for Constitutional purposes that allows judicial determinations of offender-specific facts that are relevant to sentencing, so long as such facts do not alter the range of applicable sentences. Such a rule comports with the particular competencies of the jury and judge: The jury's traditional role is to answer questions about the criminal conduct alleged in an indictment, while the judge has historically been expected to assess broader offender-based considerations such as an offender's criminal history, amenability to rehabilitation, and correctional treatment. Where, as here, a sentencing judge acts as "the reverser of juries" in finding

offense-related facts only by a preponderance of the evidence, the sentence is unconstitutional. The decision below should be reversed.

ARGUMENT

I. NYCDL'S EXPERIENCES IN NEW YORK'S FEDERAL AND STATE COURTS DEMONSTRATE THAT THERE ARE NO GENUINE PRACTICAL IMPEDIMENTS TO OVERRULING *HARRIS*

Harris should be overruled. *Apprendi* requires that a fact (other than the fact of a prior conviction) that increases the range of punishment must be charged in an indictment and found by a jury beyond a reasonable doubt. Pet. Br. 11 (citing *Apprendi*, 530 U.S. at 490). As Petitioner explains (Pet. Br. 20-21), while a plurality of the Court in *Harris* concluded that *McMillan* could be reconciled with *Apprendi*, five justices disagreed. Justice Thomas, writing for four justices, recognized that the logic of *Apprendi* applied "[w]hether one raises the floor or raises the ceiling" of sentencing ranges, because "it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Harris*, 536 U.S. at 579 (Thomas, J., dissenting). Justice Breyer, though concurring in the judgment, also observed that he could not "distinguish [*Apprendi*] from [*Harris*] in terms of logic." *Id.* at 569 (Breyer, J., concurring in part and concurring in the judgment). The simple fact that five Justices disagreed with *Harris*'s (and, by extension, *McMillan*'s) core logic weighs strongly in favor of *Harris*'s reversal.

Harris's continued vitality rests not on logical grounds, but on practical ones. While observing that "[m]andatory minimum statutes are fundamentally

inconsistent with Congress's simultaneous effort to create a fair, honest, and rational sentencing system," Justice Breyer raised concerns about the "adverse" practical consequences of extending *Apprendi* to apply to such minimums. *Id.* at 569-70. These concerns have been echoed by several other Justices since *Apprendi* was first decided. *E.g.*, *Cunningham v. California*, 549 U.S. 270, 295 (2007) (Kennedy, J., dissenting); *Apprendi*, 530 U.S. at 550-51 (O'Connor, J., dissenting); *id.* at 555 (Breyer, J., dissenting). It is this ostensible "collateral, widespread harm to the criminal justice system and the corrections process," *Cunningham*, 549 U.S. at 295 (Kennedy, J., dissenting), that provides the primary obstacle to extending *Apprendi* to mandatory minimum sentencing provisions.

NYCDL's experience in defending criminal cases in both New York federal and state courts, however, demonstrates that full enforcement of *Apprendi* would not create the potential "adverse" consequences that some Justices have raised. As explained below, the relevant players in the criminal justice system—judges, juries, prosecutors, and defense lawyers—have operated under a system effectively applying *Apprendi* to mandatory minimums for years with respect to drug offenses in New York federal courts and to numerous crimes—including arson or murder—in New York state courts. And while Justice Breyer raised questions about whether such a rule would give too much power to prosecutors, *Harris*, 536 U.S. at 571 (Breyer, J., concurring in the judgment), that result has not come to pass. If anything the requirement that the prosecution prove facts that trigger a mandatory minimum beyond a reasonable doubt has had system-wide benefits.

A. New York's Federal Courts Routinely Apply *Apprendi* To Drug-Related Mandatory Minimums

NYCDL members routinely defend against drug-related offenses, where the Second Circuit has applied *Apprendi* to federal mandatory minimums since 2005. NYCDL's experience demonstrates that the practical concerns raised by certain Justices are easily resolved by the participants in the judicial system.

After this Court decided *Apprendi*, the Second Circuit, sitting en banc, addressed how that case applied to 21 U.S.C. § 841, which proscribes the possession of certain narcotics. *See United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc). That statute contains an indeterminate sentencing range of zero to twenty years when there is no quantity of drugs charged, 21 U.S.C. § 841(b)(1)(C), and then imposes increasingly harsh sentences should larger quantities be at issue, including several mandatory minimums, *see id.* § 841(b)(1)(A)-(B). *See generally DePierre v. United States*, 131 S. Ct. 2225, 2231 & n.7 (2011) (describing mandatory minimums for possession of cocaine depending on quantity). Because § 841 involves harsher sentences depending on, *inter alia*, quantity, the Second Circuit held that under *Apprendi*, "quantity is an element of the offense charged under 21 U.S.C. § 841," and that the government must therefore "charg[e] those facts in the indictment and prov[e] them to a jury beyond a reasonable doubt" whenever the it seeks a sentence in excess of the indeterminate penalty in § 841(b)(1)(C). *Thomas*, 274 F.3d at 663.

Four years later, a unanimous panel of the Second Circuit, including then-Judge Sotomayor, extended

Thomas's holding "generally to aggravated drug offenses, not simply those resulting in sentences raising *Apprendi* concerns." *United States v. Gonzalez*, 420 F.3d 111, 125 (2d Cir. 2005). The *Gonzalez* court noted that "[t]he logic of the distinction drawn in *Harris* between facts that raise only mandatory minimums and those that raise statutory maximums is not easily grasped," but held that *Harris* did not apply because "when drug quantity raises a mandatory minimum sentence under § 841, it simultaneously raises a corresponding maximum," thus requiring *Apprendi*'s application. *Id.* at 126-27. Thus for the last seven years the federal courts within the Second Circuit have applied *Apprendi*'s strictures to both sentencing minimums and maximums when addressing crimes under 21 U.S.C. § 841.

In response to *Gonzalez*, the federal district courts in New York have routinely been able to try defendants while requiring that drug quantity be charged in the indictment, included in the jury instructions, or allocuted by a pleading defendant. *See, e.g.*, *United States v. Dozier*, No. 11-2808-cr, 2012 WL 3603438, at *1 (2d Cir. Aug. 23, 2012) (denying sufficiency of evidence challenge to jury conviction of conspiracy to distribute more than 50 grams of crack cocaine); *United States v. Morillo-Vidal*, No. 10 Cr. 222-01, 2012 WL 4328295, at *1 (S.D.N.Y. Sept. 21, 2012) (jury finding of possession and conspiracy to possess more than five kilograms of cocaine);[2] *Howard v. United States*, No. 11-CV-5208, 2012 WL 3544763, at

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[2] Under 21 U.S.C. § 846, "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense."

*3 (E.D.N.Y. Aug. 16, 2012) (denying habeas challenge because, inter alia, "the court expressly asked the jury to identify whether Howard distributed or possessed particular quantities of narcotics on any single occasion"); *United States v. Barret*, No. 10-cr-809, 2012 WL 3229291, at *18 (E.D.N.Y. Aug. 6, 2012) (denying motion for acquittal where jury found defendant guilty of conspiring to possess with intent to distribute 1,000 kilograms or more of marijuana); *Valencia-Lopez v. United States*, No. 10-CV-02893, 2012 WL 2160967, at *7 (E.D.N.Y. June 13, 2012) (rejecting ineffective assistance of counsel habeas claim because defendant "admitted at his plea hearing to the fact—alleged in his Indictment—that his crime involved at least one kilogram of heroin"). This practice is already so commonplace that the leading authority on Second Circuit jury instructions has developed a pattern instruction specifically to guide the jury in determining drug quantities. 3 LEONARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS—CRIMINAL ¶ 56-29 (2011). These numerous examples confirm NYCDL's experience that applying *Apprendi* to mandatory minimums will not have a deleterious effect on the criminal justice system.

Nor, for that matter, has the Second Circuit's decision to apply *Apprendi* to mandatory minimums resulted in the practical consequences Justice Breyer raised in his *Harris* concurrence. There, Justice Breyer predicted that applying *Apprendi* to mandatory minimums as to drug quantities would create "seriously adverse" consequences by forcing a defendant to choose between attacking the quantity of the drug and other defenses, such as mistaken identity. *Harris*, 536 U.S. at 571 (Breyer, J., concurring in the judgment). But this dilemma is no different from

many other decisions a defense lawyer makes when crafting arguments—and even choosing to forego potential arguments for strategic reasons—based on the facts of an individual case. Concerns about a single factual tension should not deprive defendants and their lawyers of their choice as to how to argue their cases.

Moreover, if this possible tension actually posed a problem that outweighed the benefits to defendants, one would expect the question to have arisen in cases after *Thomas* and *Gonzalez*. Yet the issue does not appear to have arisen in any federal court decision following *Harris*. Rather, as the Second Circuit observed in *Gonzalez*, requiring the quantity of narcotics to be proven at trial produces benefits for all parties:

> Prosecutors, who must draft indictments and develop evidence to meet their burden of proof; defendants and their counsel, who must decide whether to challenge the sufficiency of the government's case or pursue plea negotiations; and trial judges, who must rule on the relevancy and sufficiency of evidence, prepare jury instructions, and ensure the factual bases for guilty pleas, all need to know long before sentencing which facts must be proved to a jury and which ones can be reserved for resolution by the sentencing judge.

Gonzalez, 420 F.3d at 131. The consequences of applying *Apprendi* to mandatory minimums in federal courts, far from being "adverse," have in fact been salutary.

B. New York's State Courts Effectively Apply *Apprendi* To Mandatory Minimum Sentences For Numerous Crimes

NYCDL's experience in defending the accused in New York's state courts also demonstrates that applying *Apprendi* to mandatory minimums will not be, as the government claimed in its brief opposing certiorari, "disruptive." Brief for the United States in Opposition to Certiorari at 12-13, *Alleyne v. United States*, No. 11-9335. As in New York's federal courts, juries in New York's state courts are already being asked to find offense facts that can trigger mandatory minimum sentences, but this reality has not made the administration of criminal justice more complicated. Specifically, there are numerous cases where juries are presented with the option of convicting a defendant of one offense carrying a particular mandatory minimum as compared to a lesser-included offense lacking a mandatory minimum sentence (or having a lower mandatory minimum). In these cases, the determination of whether the higher mandatory minimum applies turns on whether the jury finds a particular offense fact beyond a reasonable doubt.

Consider, for example, a defendant charged in New York state court with arson. Arson in the first degree is a Class A-I felony, N.Y. Penal Law § 150.20, and therefore carries a mandatory minimum of fifteen years' incarceration, *id.* § 70.00(3)(a)(i). Arson in the second degree, by contrast, is a Class B felony, *id.* § 150.15, and therefore does not carry the fifteen-year mandatory minimum sentence, *see id.* § 70.02. Both crimes require the jury to find (1) that the defendant "intentionally damage[d] a building or motor vehicle by starting a fire"; (2) that "another person who [wa]s not a participant in the crime [wa]s present in such

building or motor vehicle at the time"; and (3) that "the defendant kn[ew] that fact or the circumstances [we]re such as to render the presence of such a person therein a reasonable possibility." *Id.* § 150.15; *see id.* § 150.20. Yet a conviction for arson in the first degree—which triggers the mandatory minimum sentence—requires the jury to find the additional element that the fire "cause[d] serious physical injury to another person." *Id.* § 150.20.[3] Thus, in New York state arson cases the jury decides whether a defendant must serve a mandatory minimum sentence based on its determination of whether the government was able to prove beyond a reasonable doubt the offense-specific element of serious physical injury to another person.

Nor is arson an isolated situation in New York. The distinction between the Class A-I felony of murder in the second degree and the Class B felony of manslaughter in the first degree, for example, similarly turns on the determination of a specific offense fact—whether the defendant acted with the intent to cause death, rather than serious physical injury. *Compare* N.Y Penal Law § 125.25 *with id.* § 125.20. Thus, the jury's factual finding on this one offense element determines whether or not the defendant is subject to a mandatory minimum sentence of life without parole. *See id.* § 70.00(3)(a)(i)(B). No New

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[3] Arson in the first degree may also be proven upon the showing of additional elements such as the use of an incendiary device or when "the explosion or fire was caused with the expectation or receipt of financial advantage or pecuniary profit by the actor." N.Y. Penal Law § 150.20.

York practitioner disputes the jury's competence to assess this critical factual question.[4]

As these examples illustrate, overturning *Harris* will have little, if any, "disruptive" or "adverse" effect, because New York state practitioners and courts (like their federal counterparts) are well versed in requiring juries to find facts that trigger mandatory minimums under *Apprendi*'s requirements. Rather, a decision holding that the government must prove to a jury beyond a reasonable doubt any offense-related facts that trigger a mandatory minimum sentence would have no more adverse practical consequences than a decision by a legislature to create separate offenses with differing elements. These are familiar requirements to both the prosecution and the defense. In sum, NYCDL's experiences show that there is little reason to think that overturning *Harris* will result in harmful collateral consequences on jury trials and sentencing.

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[4] Nor could New York evade the Fifth, Sixth, and Fourteenth Amendments through artful drafting. The New York arson statute could have been structured in the same way *Harris* read 18 U.S.C. § 924(c)—*i.e.*, with only one arson offense, which did not automatically trigger a mandatory minimum. But *Apprendi*'s constitutional requirements should not turn on the statutory structure or on the label of a particular fact as an "element" or a "sentencing factor," but rather whether the fact at issue changes the range of penalties to which a criminal defendant is exposed. *See United States v. O'Brien*, 130 S. Ct. 2169, 2181 (2010) (Stevens, J., concurring) ("When used as an element of a mandatory sentencing scheme, a sentencing factor is the functional equivalent of an element of the criminal offense itself.").

II. ANY PRACTICAL CONCERNS CAN BE RESOLVED BY DISTINGUISHING BETWEEN OFFENSE- AND OFFENDER-SPECIFIC FACTS

While applying *Apprendi* to mandatory minimums does not raise the concerns Justice Breyer identified in his *Harris* concurrence, NYCDL nonetheless recognizes that legislatures will sometimes seek to base mandatory minimums on certain offender facts that historically have not been, and often should not be, presented to a jury. Such facts, however, should still be considered by the criminal justice system. For example, the Federal Rules of Evidence properly exclude evidence of a defendant's past crimes to suggest a propensity to commit the alleged crime at issue. Fed. R. Evid. 404(b)(1). But such prior crimes are relevant to a judge's sentencing determination and are often explicitly considered by mandatory sentencing enhancements. *See, e.g.*, 18 U.S.C. § 924(c)(1)(C). NYCDL likewise recognizes that the criminal justice system involves more than just juries and crimes: there are rehabilitative concerns as well as long-term commitments to correctional systems that judges, not juries, should consider in fixing a sentence. *See Williams v. New York*, 337 U.S. 241, 248-50 & n.14 (1949) (recognizing the benefits of giving sentencing judges information "to guide them in the intelligent imposition of sentences"). As Justice Kennedy recognized in his *Cunningham* dissent, these policy considerations can be taken into account while simultaneously remaining faithful to *Apprendi*'s principles by distinguishing between facts specific to the *offense* and facts specific to the *offender*. *Cunningham*, 549 U.S. at 296-97 (Kennedy, J., dissenting). Such a line makes sense both as a

matter of Constitutional text and in consideration of institutional capacities.

A. Constitutional Text And Centuries Of Legal Tradition Mandate That Jurors Find All Offense-Specific Facts

As this Court recognized in *Apprendi*, the Constitution's "procedural safeguards designed to protect [a defendant] from unwarranted pains should apply equally to [all] acts that" a state has criminalized. 530 U.S. at 476. The Court explained that the procedural rights set out in the Fifth and Sixth Amendments are "constitutional protections of surpassing importance," *id.*, because requiring the government to prove its criminal accusations to an impartial jury beyond a reasonable doubt serves to "guard against a spirit of oppression and tyranny on the part of rulers, and as the great bulwark of our civil and political liberties," *id.* at 477 (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)). As further explained in *Blakely v. Washington*, 542 U.S. 296 (2004), these procedural rights not only "function as circuitbreaker in the State's machinery of justice," but also serve as a "fundamental reservation of power in our constitutional structure" committed to democratic self-governance. *Id.* at 306. Consequently, under the Constitution "the judge's authority to sentence derives wholly from the jury's verdict." *Id.*

These fundamental principles should be interpreted and applied in light of the precise Constitutional texts concerning jury trial rights and related criminal procedures. The jury trial right appears twice in the U.S. Constitution. Section 2 of Article III provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." And the Sixth

Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." Similarly, the Fifth Amendment, in addition to its broad due process command, sets out the grand jury requirement that must be met before persons can be "held to answer for a capital, or otherwise infamous crime" and precludes persons from being twice put in jeopardy for "the same offense." In addition to highlighting the favored status of the jury rights and bedrock procedural limits on state police power, the language of these provisions should be read together to help chart the proper boundariess of the procedural rights at issue in this case.

By framing the jury trial right in terms of "crimes," which are the basis for a "prosecution" of "the accused," and by using the terms "crime" and "offense" in Article III and the Fifth Amendment, the constitutional text connotes that the criminal procedure rights in the Fifth and Sixth Amendments attach to any and all offense conduct for which the state seeks to impose a specific form of criminal punishment. *See United States v. White*, 551 F.3d 381, 390 (6th Cir. 2008) (Merritt, J., dissenting) ("By attaching the jury-trial right to *crimes*, rather than to any and all decisions related to the *accused*, the constitutional text suggests a basis for the distinction between offense conduct and offender characteristics."); *cf. Apprendi*, 530 U.S. at 500 (Thomas, J., concurring) (because "[a]ll of these constitutional protections determining which facts constitute the 'crime,'" "in order for a jury trial of a crime to be proper, all elements of the crime must be proved to the jury (and ... proved beyond a reasonable doubt)"). All specific and defined facts relating to offense conduct which the law makes the basis for depriving a

person of any "life, liberty, or property" are subject to the jury trial right and related constitutional protections.

The jury trial right therefore can and should be understood to concern any and all offense conduct set forth in criminal statutes because the state, through its legislative and executive branches, defines "crimes" and accuses and prosecutes crimes based on what persons do (and not based on who they are). When the law ties mandatory consequences to any specific "offense" conduct—such as the amount of money or drugs involved in an offense, or whether and how the defendant used a weapon, or whether the offense caused bodily harm to a victim—the state has legally defined the specific conduct it believes merits criminal sanction. The jury trial right, in turn, guarantees that a defendant can demand that the state prove to a jury that the defendant did in fact commit the specific offense conduct the state seeks to punish.

B. The Differing Institutional Capacities Of Juries And Judges Allow A Judge To Find Offender-Specific Facts That Do Not Alter Sentencing Ranges

Notwithstanding the importance of the jury, the modern criminal justice system still requires the efforts of sentencing judges to both appropriately tailor individual sentences and to maintain their "broad view and long-term commitment to correctional systems." *Cunningham*, 549 U.S. at 296 (Kennedy, J., dissenting). As the Court recently highlighted in *Oregon v. Ice*, a sentencing judge's fact-finding actions are constitutionally permissible so long as "[t]here is no encroachment ... by the judge upon facts historically found by the jury, nor any

threat to the jury's domain as a bulwark at trial between the State and the accused." 555 U.S. 160, 169 (2009). Therefore, so long as a judge does not find offense-specific facts or facts that would otherwise alter the range of sentences to which a defendant would otherwise be exposed, judicial factfinding of offender-specific facts brings distinct benefits into the modern criminal justice system.

Jury trials and sentencing serve distinctly different functions. As the Court has long understood, trials are backward-looking adjudications properly focused on requiring the government to establish all of the facts on which the state bases its demand for criminal punishment. *See Williams*, 337 U.S. at 246-47. Unlike sentencing factors, which "traditionally involve characteristics of the offender ... [c]haracteristics of the offense itself are traditionally treated as elements," which "lie[] 'closest to the heart of the crime at issue.'" *United States v. O'Brien*, 130 S. Ct. 2169, 2176 (2010) (quoting *Castillo v. United States*, 530 U.S. 120, 126 (2000)).

Juries are also better suited to find offense-related facts because they benefit from the limitations on admissible evidence, which ensure that adverse offender-related facts do not influence their factual determinations. Of course, offender-related facts are critical for a judge to set a fair sentence, but they are legally irrelevant to determining the facts of an offense and can sometimes prove to be unduly prejudicial in that context. *Cf. Pepper v. United States*, 131 S. Ct. 1229, 1240 (2011) ("For the determination of sentences, justice generally requires consideration *of more than the particular acts by which the crime was committed* and that there be taken into account the circumstances of the offense together with the

character and propensities of the offender." (emphasis added) (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937)).

By contrast, sentencing is "not confined to the narrow issue of guilt" but rather concerns "the type and extent of punishment after the issue of guilt has been determined," *Williams*, 337 U.S. at 247, and thus justifies allowing a sentencing decision-maker to possess "the fullest information possible concerning the defendant's life and characteristics," *Pepper*, 131 S. Ct. at 1240; *see also United States v. Grayson*, 438 U.S. 41, 53 (1978) (stressing that "the evolutionary history of sentencing ... demonstrates that it is proper—indeed, even necessary for the rational exercise of [sentencing] discretion—to consider the defendant's whole person and personality."). Moreover, offender-specific facts raise considerations that are of critical importance to both a defendant and the criminal justice system writ large, but would be problematic to present to a jury. *See Cunningham*, 549 U.S. at 297 (Kennedy, J., dissenting) (identifying "prior convictions; cooperation or noncooperation with law enforcement; remorse or the lack of it; or other aspects of the defendant's history bearing upon his background and contribution to the community" as relevant offender-specific facts); *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (allowing sentencing judge to find facts relating to defendant's criminal history even if fact of prior conviction increases maximum sentence). These elements play a vital role in allowing judges to tailor appropriate sentences for individual defendants while maintaining the rough uniformity established by sentencing ranges. As long as offender-specific facts are not an element of the crime charged, there is no Constitu-

tional prohibition against allowing a sentencing judge to find them.[5]

C. *Harris* Improperly Allows Sentencing Judges To Retain Offense-Specific Fact-Finding Power

Under this sensible construction of both the Constitution's text and this Court's prior precedents, there is even more reason for the Court to overrule *Harris* for breaching the line between offense- and offender-specific facts. Whenever a judge engages in fact-finding because operative law ties mandatory punishment to any specific "offense" conduct—such as the amount of money or drugs involved in an offense, or whether and how the defendant used a weapon, or whether the offense caused bodily harm to a victim—the judge invades the jury's traditional province as trier of fact concerning a "crime."

Attempting to harmonize the Court's sentencing and Sixth Amendment jurisprudence just after *Apprendi*, the plurality opinion in *Harris* provided this account of applicable constitutional principles:

> Read together, *McMillan* and *Apprendi* mean that those facts setting the outer limits of a sentence, and of the judicial power to impose it, are the elements of the crime for the purposes of the constitutional analysis. Within the range authorized by the jury's verdict, however, the

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[5] There may be a handful of statutes where an offender-specific characteristic is an element of the crime and therefore should be treated as such for Sixth Amendment purposes. *See, e.g.*, 18 U.S.C. § 2241(c) (defendant's age in relation to victim is an element of the offense of statutory rape); *id.* § 922(g) (defendant's prior felony conviction is an element of "felon in possession" offense).

> political system may channel judicial discretion—and rely upon judicial expertise—by requiring defendants to serve minimum terms after judges make certain factual findings.

536 U.S. at 567 (plurality opinion). This effort to conceptually distinguish between facts raising maximum and minimum terms sows confusion and uncertainty—especially in light of the rulings and reasoning in *Apprendi*, *Blakely*, and their progeny. *Harris*'s reference to "judicial expertise" makes little sense if and when a judge is by statute required to engage in backward-looking fact-finding concerning offense circumstances. As former U.S. District Judge Nancy Gertner astutely noted in a commentary on *Harris*, when a judge is required to find offense facts for applying mandatory minimum sentencing terms, often "the judge is 'just' another fact finder, doing precisely what the jury does: finding facts with specific and often harsh sentencing consequences." Nancy Gertner, *What Has* Harris *Wrought*, 15 FED. SENT'G REP. 83, 84 (2002). To speak in this setting of reliance on "judicial expertise" for making factual findings is nonsensical unless and until this fact-finding is confined and limited only to finding those facts concerning offender-related characteristics that have historically been seen as a component of sentencing decision-making.

Harris's approach—permitting judicial fact-finding about the kinds of offense facts traditionally presented to juries—raises the very specter of usurpation of the jury function that this Court has identified in numerous cases. Because *Harris* allows a judge to find facts relating to an offense, for example, "a judge's later, sentencing-related decision that the defendant used [a] machinegun, rather than, say, [a]

pistol, *might conflict with the jury's belief* that he actively used [a] pistol." *O'Brien*, 130 S. Ct. at 2177 (emphasis added) (quoting *Castillo*, 530 U.S. at 128). Such contradictory decisions can undermine the public's perception of the fairness of the criminal justice system. Requiring juries to be the exclusive arbiters of offense-related facts protects public confidence in criminal judgments and the sentences which follow. *See Blakely*, 542 U.S. at 306 (the "jury trial is meant to ensure [the people's] control in the judiciary"). When a sentence is mandatorily enhanced on the basis of the judge's own factual findings concerning offense conduct, facts that the Constitution places in the exclusive province in the jury and that the jury is particularly well-suited to find, such a sentence process should be and is unconstitutional.

As this case makes clear, this error is more than merely hypothetical. Though the jury concluded that Petitioner did not brandish a weapon during the commission of the crime, J.A. 40, the sentencing judge found by a preponderance of the evidence that Petitioner reasonably foresaw that his alleged accomplice would brandish a firearm during the crime at issue, J.A. 61-62. Expressly recognizing that the mandatory minimum at issue allowed the judge to "be[] the reverser of juries," J.A. 48, the district court imposed a sentence based on an offense-related fact not found by the jury. Because the sentencing court relied on a quintessentially offense-specific fact in altering the sentencing range to which Petitioner was exposed, the judgment below must be reversed and *Harris* overruled.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

ALLEN RYAN ALLEYNE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE SENTENCING PROJECT AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF THE SENTENCING PROJECT AND THE AMERICAN CIVIL LIBERTIES UNION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*[1]

This *amicus curiae* brief is submitted on behalf of The Sentencing Project and the American Civil Liberties Union. Each organization has a special interest and expertise in criminal justice matters.

1. **The Sentencing Project** is a national nonprofit organization established in 1986 to engage in public policy research and education on criminal justice reform. The Sentencing Project has produced a broad range of scholarship assessing the effects of mandatory minimums on racial disparities in the American criminal justice system, and members of its staff have been invited to testify before Congress, the United States Sentencing Commission, and professional audiences on the topic. Because mandatory minimums are a primary catalyst for fundamental inequities and flaws in the American federal criminal court system, this case raises questions of fundamental importance to The Sentencing Project and its members.

2. **The American Civil Liberties Union** is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the prin-

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

ciples of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU Criminal Law Reform Project is a division of the ACLU, whose goal is to put an end to excessively harsh crime policies that result in mass incarceration and stand in the way of a just and equal society. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*. Because this case calls into question the meaning and scope of the jury trial right, both as a means to protect against arbitrary government action and to preserve public confidence in the criminal justice system, it raises questions of fundamental importance to the ACLU and its members.

SUMMARY OF ARGUMENT

1. *Harris* v. *United States*, 536 U.S. 545 (2002), must be overturned. *Harris*'s logic is impossible to reconcile with *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). These irreconcilable differences have resulted in a persistent circuit split in federal drug cases. The courts of appeals are divided over whether drug quantity must be charged in an indictment and proved to a jury beyond a reasonable doubt in order to impose a mandatory minimum sentence under 21 U.S.C. § 841. Seven circuits allow judges to set and increase mandatory minimum sentences after finding drug quantity by a mere preponderance of the evidence. Because such a factual finding raises the statutory maximum, this approach violates *Apprendi*. These courts have evaded this problem by mixing and matching mandatory minimums and statutory maximums, thus disregarding the statutory text.

2. Overturning *Harris* would eliminate the circuit split by requiring that drug quantity be charged in an indictment and proved to a jury beyond a reasonable doubt to set or increase a mandatory minimum.

3. Requiring drug quantity to be charged in an indictment and proved to a jury imposes a minimal burden on the system. A sample of indictments and verdict forms reveals that some United States Attorneys' Offices in all twelve circuits charge drug quantity in their indictments. Prosecutors outside of the sample districts also likely charge drug quantity, because they must do so to request a sentence above the default statutory maximum.

4. Overruling *Harris* is consistent with this Court's precedent, the structure of § 841, and sound sentencing policy. *Harris* was inconsistent with *Apprendi* when decided, and is inconsistent with this Court's subsequent jurisprudence. Treating drug quantity as a sentencing factor is likewise inconsistent with the statute, which sets out independent ranges, not untethered mandatory minimum penalties. Finally, treating drug quantity as a sentencing factor is inconsistent with sound sentencing policy. Mandatory minimum sentences are a significant driver of racial disparity in sentencing. Overruling *Harris* will mean that drug quantity is charged and proved in fewer cases and will thus lead to fewer mandatory minimum sentences. Because a higher percentage of black defendants are subjected to mandatory minimums, fewer mandatory minimum sentences will reduce unwarranted racial disparity in sentencing.

ARGUMENT

I. *HARRIS* AND *APPRENDI* HAVE CREATED AN IMPORTANT AND PERSISTENT CIRCUIT SPLIT OVER MANDATORY MINIMUMS IN DRUG CASES.

A. *Harris* Has Consequences Beyond 18 U.S.C. § 924(c).

Allen Ryan Alleyne petitions this Court to overrule *Harris* v. *United States*, 536 U.S. 545 (2002), by applying the holding of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to any fact that increases the range—whether the upper *or lower* bound—of punishment to which a criminal defendant is exposed. Although Alleyne's case arose under 18 U.S.C. § 924(c), that is not the only criminal statute that contains mandatory minimums. In 2010, 77% of federal convictions carrying a mandatory minimum were for drug trafficking offenses, and approximately two-thirds of drug offenders were convicted of an offense carrying a mandatory minimum. See U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 122, 153 (2011) (*2011 Report*), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

B. Lower Courts Disagree Over The Application Of *Harris* In Federal Drug Cases.

Overruling *Harris* would resolve a deep circuit split over mandatory minimum sentences in federal drug cases and would resolve that split in a way that

is most consistent with *Apprendi*.[2] On one side of the split, four courts of appeals require drug quantity to be charged in an indictment and proved to a jury beyond a reasonable doubt before a court can impose a mandatory minimum sentence.[3] On the other side of the split, seven courts of appeals interpret *Harris* to mean that when a drug quantity finding sets or increases a mandatory minimum penalty, but the sentence imposed does not exceed the unenhanced statutory maximum, drug quantity may be omitted from an indictment and found by a judge by a preponderance of the evidence.[4]

1. Courts have struggled to understand the constitutional requirements for imposing mandatory minimums in federal drug cases, and have had difficulty squaring *Harris* with *Apprendi* in that context. *Apprendi* held that "any fact that increases the maximum penalty for a crime beyond the prescribed statutory maximum must be" "charged in an indict-

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[2] The circuit split implicates drug cases arising under 21 U.S.C. §§ 841, 846, and 960.

[3] See *United States* v. *Gonzalez*, 420 F.3d 111, 123, 120–23 (2d Cir. 2005); *United States* v. *Martinez*, 277 F.3d 517, 528, 530 (4th Cir. 2002); *United States* v. *Velasco-Heredia*, 319 F.3d 1080, 1085–87 (9th Cir. 2003); *United States* v. *Graham*, 317 F.3d 262, 273–75 (D.C. Cir. 2003).

[4] See *United States* v. *Goodine*, 326 F.3d 26, 33 (1st Cir. 2003); *United States* v. *Keith*, 230 F.3d 784, 786–87 (5th Cir. 2000); *United States* v. *Leachman*, 309 F.3d 377, 382–83 (6th Cir. 2002); *United States* v. *Washington*, 558 F.3d 716, 719 (7th Cir. 2009); *United States* v. *Webb*, 545 F.3d 673, 677–78 (8th Cir. 2008); *United States* v. *Ramirez*, 43 F. App'x 358, 360 (10th Cir. 2002); *United States* v. *Clay*, 376 F.3d 1296, 1301 (11th Cir. 2004). One additional court of appeals has never squarely addressed the specific question over which the circuits are split. See *United States* v. *Vazquez*, 271 F.3d 93, 98 (3d Cir. 2001).

ment, submitted to a jury, and proven beyond a reasonable doubt," 530 U.S. at 490, 476 (citations omitted), and that it is "unconstitutional *** to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed," *id.* at 490. "[T]he relevant inquiry is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* at 494.

The *Harris* plurality, however, concluded that "a fact increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum)," 536 U.S. at 557, "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt," *id.* at 568. *Harris* deemed such a factual finding to be a "sentencing facto[r]" rather than an "elemen[t]." *Id.* at 556. The dissent in *Harris* countered that the *Apprendi* rule extends to facts that set mandatory minimums. "When a fact exposes a defendant to greater punishment than what is otherwise legally prescribed, that fact is 'by definition [an] 'elemen[t]' of a separate legal offense.'" *Harris*, 536 U.S. at 579 (Thomas, J., dissenting) (quoting *Apprendi*, 530 U.S. at 483 n.10). The dissent reasoned: "Whether one raises the floor or raises the ceiling it is impossible to dispute that the defendant is exposed to greater punishment than is otherwise prescribed." *Id.*

Alleyne's argument that "[a] mandatory minimum sentence changes the range of permissible sentences by increasing the punishment the judge would otherwise have discretion to impose" applies to the drug statute and the gun statute. Brief for Petitioner at 10. The drug statute's structure, however, creates

an additional *Apprendi* problem. A drug quantity that is not charged in an indictment or proved to a jury, but nevertheless sets a mandatory minimum, also raises the statutory maximum to which the defendant is exposed, a circumstance "*Harris* simply does not speak to." *United States* v. *Gonzalez*, 420 F.3d 111, 127 (2d Cir. 2005). The penalty provisions of the drug statute lay out three distinct ranges: 0 to 20 years; 5 to 40 years; and 10 years to life. 21 U.S.C. § 841(b)(1)(C), (B), (A). These penalty ranges correspond to offenses of conviction involving an unquantified amount of drugs, a quantity of drugs above a certain threshold, and a quantity of drugs above a higher threshold, respectively. A drug quantity finding that sets or increases a mandatory minimum therefore raises the punishment ceiling as well as the punishment floor.

Raising either the floor or the ceiling necessarily "*expose[s] the defendant to a greater punishment* than that authorized by the jury's guilty verdict," *Gonzalez*, 420 F.3d at 123 (emphasis added) (quoting *Apprendi*, 530 U.S. at 494), and "*increase*[*s*] *the prescribed range of penalties* to which a criminal defendant is exposed," *id.* at 127 (quoting *Apprendi*, 530 U.S. at 490). Thus, a drug quantity finding that sets a mandatory minimum is an "element" of the offense that must be charged in an indictment and proved to a jury beyond a reasonable doubt. In fact, in a case before this Court, "[t]he Government concede[d] that [an] indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence" violated *Apprendi*. *United States* v. *Cotton*, 535 U.S. 625, 632 (2002).

The courts of appeals have split over *Apprendi*'s implications for drug quantity findings. Four courts

require that a drug quantity that sets a mandatory minimum must be pleaded and proved. Other courts invoke *Harris* to allow judges to find the facts that set mandatory minimums, effectively rewriting the drug statute.

2. The Second Circuit and the Ninth Circuit interpret *Apprendi* to require drug quantity to be charged in an indictment and submitted to a jury for a beyond-a-reasonable-doubt finding before a mandatory minimum penalty may be imposed. These circuits focus on the fact that "when drug quantity raises a mandatory minimum sentence under § 841, *it simultaneously raises a corresponding maximum*, thereby increasing a defendant's *authorized* sentencing range above what it would have been if he had been convicted of an identical unquantified drug crime." *Gonzalez*, 420 F.3d at 126 (emphasis added) (Raggi, J., joined by Sack and Sotomayor, JJ.); see also *id.* at 131 ("[M]andatory minimums operate in tandem with increased maximums in *§ 841(b)(1)(A)* and *-(b)(1)(B)* to create sentencing ranges that raise the limit of the possible federal sentence."); *Velasco-Heredia*, 319 F.3d at 1085. These courts conclude that drug quantity "increases the 'prescribed range of penalties to which a criminal defendant is exposed'" in violation of *Apprendi*. *Gonzalez*, 420 F.3d at 127 (quoting *Apprendi*, 530 U.S. at 490); see also *Velasco-Heredia*, 319 F.3d at 1085.

The Second Circuit explicitly rejects the notion that drug quantity can "perform[] as a sentencing factor for purposes of determining the applicable minimum sentence but as an element for purposes of determining the applicable maximum." *Gonzalez*, 420 F.3d at 122. "Nothing in the structure of [§ 841] suggests that *** corresponding minimums and max-

imums *** can be delinked to permit mixing and matching across subsections to create hybrid sentencing ranges not specified by Congress." *Id.* at 121 (prohibiting a judge from creating a de facto range of 5 to 20 or 10 to 20 years); see also *Velasco-Heredia*, 319 F.3d at 1086. Consequently, in the Second and Ninth Circuits, a sentencing court is prohibited from imposing a mandatory minimum penalty if the requisite drug quantity has not been charged in an indictment and proved to a jury beyond a reasonable doubt. *Gonzalez*, 420 F.3d at 131; *Velasco-Heredia*, 319 F.3d at 1086.

3. Two additional courts of appeals—the Fourth Circuit and the D.C. Circuit—hold that setting a mandatory minimum penalty without charging drug quantity in an indictment and submitting it to a jury constitutes *Apprendi* error. In the Fourth Circuit, it is *Apprendi* error for a defendant who pleads guilty to distributing an unquantified amount of drugs under § 841(b)(1)(C) to be subjected to a ten-year mandatory minimum penalty under § 841(b)(1)(A). *United States* v. *Martinez*, 277 F.3d 517, 530 (4th Cir. 2002). But *cf. United States* v. *Graham*, 75 F. App'x 145, 149 (4th Cir. 2003) (unpublished) (noting that if *Harris* permits statutory mixing and matching, it may undermine post-*Apprendi* cases holding that "*no* mandatory minimum sentence [is] applicable in section 841 cases where no drug quantity is alleged in the indictment").

The D.C. Circuit explains that § 841 is "a tripartite statute establishing three separate offenses, with different maximum sentences based on drug quantity, and not a unitary statute with drug quantity as a *sentencing factor*." *United States* v. *Graham*, 317 F.3d 262, 274 (D.C. Cir. 2003) (emphasis added). In

Graham, the court determined that the sentencing court had committed *Apprendi* error by "treat[ing] subparagraphs (A) and (C) of § 841 as mere sentencing factors." 317 F.3d at 275. Specifically, *Graham* held that a sentencing judge violated *Apprendi* by imposing a supervised release term based on a drug quantity that was never charged or proved to the jury. *Id.* The court concluded that the judge "appears to have tracked the mandatory minimum sentencing provisions of § 841, and thus may have applied § 841(b)(1)(A), which increased Graham's supervised release period by two years" above the three-year mandatory minimum term available under § 841(b)(1)(C). *Id.* The court deemed this error, even though the five-year term did not exceed the statutory *maximum* authorized under § 841(b)(1)(C). *Id.*; see also *United States* v. *Mouling*, 557 F.3d 658, 667 (D.C. Cir. 2009) (holding that the sentencing court committed *Apprendi* error in setting a mandatory minimum when the requisite drug quantity had not been proved to the jury, but concluding that this error did not meet the fourth prong of the plain error test).

4. Seven circuits come down on the other side of the split. Most of these circuits rely on *Harris* to hold that the facts that set mandatory minimums in drug cases do not need to be charged or proved to a jury beyond a reasonable doubt, even though those facts raise both the punishment floor and the punishment ceiling. These circuits treat *Harris* as an exception to *Apprendi*, and refuse to find an *Apprendi* violation unless the sentence actually imposed exceeds the statutory maximum. See *United States* v. *Goodine*, 326 F.3d 26, 33 (1st Cir. 2003); *United States* v. *Solis*, 299 F.3d 420, 454 (5th Cir. 2002); *United States* v. *Leachman*, 309 F.3d 377, 382–83 (6th Cir. 2002);

United States v. *Washington*, 558 F.3d 716, 719 (7th Cir. 2009); *United States* v. *Webb*, 545 F.3d 673, 677–78 (8th Cir. 2008); *United States* v. *Clay*, 376 F.3d 1296, 1301 (11th Cir. 2004). The Tenth Circuit, in an unpublished opinion, has cited *Harris* to uphold a mandatory minimum sentence against an *Apprendi* challenge. *United States* v. *Ramirez*, 43 F. App'x 358, 360 (10th Cir. 2002).

These circuits have split with the other four circuits. Instead of recognizing that, under the drug statute, any increase in the mandatory minimum automatically increases the statutory maximum, these courts borrow a statutory maximum from another section of the statute. They hold that sentencing judges may apply a mandatory minimum from § 841(b)(1)(A) or (B) as long as the sentence imposed does not exceed the unquantified statutory maximum from § 841(b)(1)(C). See, *e.g.*, *Washington*, 558 F.3d at 718–20. To sidestep the *Apprendi* violation, these circuits manipulate the statute in a way that is inconsistent with its text and structure.

Consequently, a number of these courts hold—in contrast to the other four circuits—that drug quantity can be a sentencing factor for the purpose of setting or increasing a mandatory minimum and an element for the purpose of exceeding a statutory maximum. The First, Fifth, Eighth, and Eleventh Circuits explicitly hold that drug quantity, typically a sentencing factor that can be proved by a preponderance of the evidence, becomes an element if and only if the defendant actually receives a sentence that exceeds the unquantified statutory maximum. See, *e.g.*, *United States* v. *Stark*, 499 F.3d 72, 80 (1st Cir. 2007); *United States* v. *Keith*, 230 F.3d 784, 786–87 (5th Cir. 2000); *Webb*, 545 F.3d at 678; *Clay*, 376

F.3d at 1301. The Seventh Circuit has, by implication, reached the same conclusion. Compare *Washington*, 558 F.3d at 719), with *United States* v. *Clark*, 538 F.3d 803, 812 (7th Cir. 2008).

The Third Circuit has never squarely addressed the question of how *Harris* applies to *mandatory minimums* under the drug statute. But it held, before *Harris*, that *Apprendi* is not violated when drug quantity is not pleaded and proved as long as the sentence imposed is below the unquantified statutory maximum. See *United States* v. *Vazquez*, 271 F.3d 93, 98 (3d Cir. 2001) (en banc). However, two judges on the Third Circuit disagreed and stated that "drug type and quantity are *always* elements of an offense under § 841, and therefore must *always* be submitted to the jury for proof beyond a reasonable doubt." *Id.* at 108 (Becker, J., concurring, joined by Ambro, J.).

5. One of the circuits that condones mixing and matching has nevertheless questioned *Harris*'s logic. The Seventh Circuit recently noted that "it is difficult to reconcile *McMillan* [v. *Pennsylvania*, 447 U.S. 79 (1986)] with *Apprendi*." *United States* v. *Krieger*, 628 F.3d 857, 869 (7th Cir. 2010). While adhering to circuit precedent, the court observed that "[l]ogically, *** [w]hether labeled an element or a sentencing factor, if a fact triggers a mandatory minimum, the expected punishment will have increased and the government can require the judge to impose a higher punishment than she might have chosen otherwise." *Id.* (citing *Apprendi*, 530 U.S. at 521–22 (Thomas, J., dissenting)); see also *id.* at 871 (concluding reluctantly that a fact resulting in a 20-year mandatory minimum did not need to be pleaded or proved because the sentence did not exceed the 20-year statutory maximum for an unquantified drug offense).

II. OVERRULING *HARRIS* WOULD NECESSARILY RESOLVE THIS CONFLICT WITH MINIMAL EFFECT ON DRUG PROSECUTIONS.

A. A Decision In Favor Of Alleyne Necessarily Resolves The Circuit Split Over Mandatory Minimums In Drug Cases.

1. As demonstrated in Part I, *Harris* has caused a circuit split over how to apply *Apprendi* in drug cases. A decision in favor of Alleyne in this case will necessarily resolve this circuit split. Overruling *Harris* will require drug quantity to be charged in an indictment and proved to a jury beyond a reasonable doubt to establish both the mandatory minimum and the statutory maximum, as currently required by four courts of appeals. This requirement eliminates the dual *Apprendi* problems created when a judge finds uncharged drug quantities under a preponderance-of-the-evidence standard and imposes a mandatory minimum, which in turn raises a defendant's statutory maximum. It would also end the practice of courts mixing and matching statutory minimum and maximum sentences from § 841(b)(1)'s different subparagraphs.

2. Conversely, a decision in favor of the United States will ensure that this deep split persists among the circuits. If this Court continues to hold that the facts establishing mandatory minimum sentences need not be pleaded and proved to a jury beyond a reasonable doubt, the circuit split will remain. Some courts will continue to distinguish *Harris*. Other courts will continue to treat *Harris* as an exception to *Apprendi* and rewrite the drug statute, borrowing

a mandatory minimum sentence from one subparagraph of § 841(b)(1) without applying the corresponding statutory maximum. A decision overruling *Harris* will resolve the split and consequent geographic charging and sentencing disparity.

B. Requiring Drug Quantity To Be Pleaded And Proved To A Jury Poses A Minimal Burden On The System.

1. Although the courts of appeals are divided on *Harris*'s implications in drug cases, federal charging practices demonstrate that prosecutors frequently charge drug quantity and submit it to a jury for a beyond-a-reasonable-doubt finding. A sample of indictments and verdict forms reveals that, in practice, some United States Attorneys' Offices in all twelve circuits charge drug quantity in indictments, and juries are required to find the charged quantity beyond a reasonable doubt.[5] This practice occurs even within

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[5] There is no database regarding how drug quantity is currently charged and proved in each district within the federal system. Counsel therefore searched Westlaw and PACER for drug trafficking cases in all twelve circuits that had gone to trial. Counsel examined indictments, jury verdict forms, and, where possible, jury instructions. Although the cited documents are a limited sample, United States Attorneys' Offices often have standard practices regarding their indictments and jury verdict forms. **First Circuit**: Indictment, *United States* v. *Baez*, No. 1:06-cr-00071-S-PAS (D.R.I. June 7, 2006), ECF No. 6; Verdict Form, *Baez*, ECF No. 50; Jury Instructions (Gov't) at 3, 9, *Baez*, ECF No. 38; Indictment, *United States* v. *Olivo*, No. 1:06-cr-00069-ML-LDA (D.R.I. June 7, 2006), ECF No. 1; Verdict Form, *Olivo*, ECF No. 37; Indictment, *United States* v. *Gonzalez*, No. 1:05-cr-00137-S-LDA (D.R.I. Dec. 14, 2005), ECF No. 7; Verdict Form, *Gonzalez*, ECF No. 78; Jury Instructions (Gov't) at 5, 9, 15, *Gonzalez*, ECF No. 80. **Second Circuit**: Indictment, *United States* v. *Harrison*, No. 5:07-cr-00410-NAM (N.D.N.Y. Sept. 19,

2007), ECF No. 1; Verdict Form, *Harrison*, ECF No. 48; Jury Instructions (Defense) at 16, *Harrison*, ECF No. 30; Indictment, *United States* v. *Geronimo*, No. 1:06-cr-00087-CBA (N.D.N.Y. Feb. 2, 2006), ECF No 18; Verdict Form, *Geronimo*, ECF No. 120. **Third Circuit**: Indictment, *United States* v. *Stearn*, No. 2:07-cr-00323-LDD (E.D. Pa. June 6, 2007), ECF No. 1; Verdict Form, *Stearn*, ECF No. 60; Indictment, *United States* v. *Johnson*, No. 2:07-cr-00075-HB (E.D. Pa. Feb. 14, 2007), ECF No. 31; Verdict Form, *Johnson*, ECF No. 196; Jury Instructions at 53, *Johnson*, ECF No. 185. **Fourth Circuit**: Indictment, *United States* v. *Harris*, No. 3:11-cr-00097-HEH (E.D. Va. Apr. 5, 2011), ECF No. 3; Verdict Form, *Harris*, ECF No. 34; Jury Instructions at 18, 28, *Harris*, ECF No. 21. **Fifth Circuit**: Indictment, *United States* v. *Victor Valles-Velazquez*, No. 5:05-cr-02731 (S.D. Tex. Dec. 20, 2008), ECF No. 58; Verdict Form, *Valles-Velazquez*, ECF No. 104; Jury Instructions at 8–9, *Valles-Velazquez*, ECF No. 98; Indictment, *United States* v. *Rudy Gutierrez, Jr.*, No. 2:06-cr-0038 (S.D. Tex. June 14, 2006), ECF No. 57-2; Verdict Form, *Gutierrez*, ECF No. 195; Jury Instructions at 8–10, *Gutierrez*, ECF No. 194. **Sixth Circuit**: Indictment, *United States* v. *Bonas*, No. 2:07-cr-20309-VAR-RSW (E.D. Mich. June 12, 2007), ECF No. 37; Verdict Form, *Bonas*, ECF No. 172; Jury Instructions at 18, 27, 29, *Bonas*, ECF Nos. 173, 173-2; Indictment, *United States* v. *Powers*, No. 5:05-cr-900021-JCO-DAS (E.D. Mich. June 30, 2005), ECF No. 1; Verdict Form, *Powers*, ECF No. 14; Jury Instructions at 21, *Powers*, ECF No. 12. **Seventh Circuit**: Indictment, *United States* v. *Ousley*, No. 1:10-cr-10044-JES-JAG (C.D. Ill Apr. 7, 2010), ECF No. 7; Verdict Form, *Ousley*, ECF No. 37; Jury Instructions at 29, 32, *Ousley*, ECF No. 42; Indictment, *United States* v. *McSwain*, No. 3:05-cr-50082 (N.D. Ill Feb. 20, 2007), ECF No. 330; Verdict Form, *McSwain*, ECF No. 400; Jury Instructions at 20, *McSwain*, ECF No. 404. **Eighth Circuit**: Indictment, *United States* v. *Longs*, No. 0:07-cr-00189-JRT-JST (D. Minn. Sept. 6, 2007), ECF No. 355; Verdict Form, *Longs*, ECF No. 745; Jury Instructions at 35–36, *Longs*, ECF No. 742; Indictment, *United States* v. *Fenner*, No. 0:06-cr-00211-MJD-AJB (D. Minn. July 13, 2006), ECF No. 26; Verdict Form, *Fenner*, ECF No. 167; Jury Instructions at 41, *Fenner*, ECF Nos. 159, 159-1. **Ninth Circuit**: Indictment, *United States* v. *Holiday*, No. 3:09-033393-BTM (S.D. Cal. Sept. 23, 2009), ECF No. 20; Verdict Form, *Hol-*

the seven circuits that do not require drug quantity to be charged or proved to a jury beyond a reasonable doubt to sentence a defendant to a mandatory minimum. Consequently, overruling *Harris* would not impose an undue burden on prosecutors and courts in these districts.

And a significant percentage of the total federal drug trafficking defendants nationwide are sentenced within federal districts that follow this practice. In 2011, for example, 38% of all drug trafficking sentencings in the country occurred in the Second, Fourth, Ninth, and D.C. Circuits, and an additional 16% of such sentencings occurred within the other

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iday, ECF No. 276; Indictment, *United States* v. *Alfonso*, No. 3:08-02970-BTM (S.D. Cal. Sept. 3, 2008), ECF, No. 7; Verdict Form, *Alfonso*, ECF No. 78; Jury Instructions at 19, 20, *Alfonso*, ECF No. 77. **Tenth Circuit**: Indictment, *United States* v. *Bagby*, No. 4:10-cr-00134-CVE (N.D. Okla. Sept. 7, 2010), ECF No. 11; Verdict Form, *Bagby*, ECF No. 41; Jury Instructions at 32, *Bagby*, ECF No. 39; Indictment, *United States* v. *Sago*, No. 1:08-cr-00251-JLK (D. Colo. June 2, 2008), ECF No. 1; Verdict Form, *Sago*, ECF No. 39; Jury Instructions at 24, *Sago*, ECF No. 29-1. **Eleventh Circuit**: Indictment, *United States* v. *Cooper*, No. 2:06-cr-14029-KMM (S.D. Fla. June 9, 2006), ECF No. 22; Verdict Form, *Cooper*, ECF No. 173; Jury Instructions at 13, 15, *Cooper*, ECF No. 171; Indictment, *United States* v. *Longoria*, No. 2:05-cr-14075-DLG (S.D. Fla. Sept. 27, 2005), ECF No. 12; Verdict Form, *Longoria*, ECF No. 103; Jury Instructions at 14–18, *Longoria*, ECF No. 100; Indictment, *United States* v. *St. Louis*, No. 2:05-cr-14058-JEM (S.D. Fla. July 29, 2005), ECF No. 4; Verdict Form, *St. Louis*, ECF No. 72; Jury Instructions at 13–16, *St. Louis*, ECF No. 68. **D.C. Circuit**: Indictment, *United States* v. *Bigesby*, No. 1:08-cr-00261-RJL (D.D.C. Aug. 19, 2008), ECF No. 8; Verdict Form, *Bigesby*, ECF No. 41; Jury Instructions at 4–5, *Bigesby*, ECF No. 27; Indictment, *United States* v. *Smith*, No. 1:07-cr-00153-TFH (D.D.C. June 12, 2007), ECF No. 1; Verdict Form, *Smith*, ECF No. 497; Jury Instructions at 32, *Smith*, ECF No. 327-3.

federal districts from which the sampling of indictments and verdict forms are drawn.[6] Therefore, at least 54% of all drug trafficking sentencings last year occurred in districts where prosecutors charge drug quantity in an indictment and submit it to a jury.

2. Given *Apprendi*'s requirements, it is possible that even more districts than those from which the sample documents are drawn charge drug quantity and prove it to a jury. In every circuit, prosecutors seeking a sentence above the unquantified statutory maximum in § 841(b)(1)(C) must charge drug quantity and prove it to a jury beyond a reasonable doubt. See *Apprendi*, 530 U.S. at 494; see also *id.* at 498 (Scalia, J., concurring); *Keith*, 230 F.3d at 786–87; *Webb*, 545 F.3d at 678; *Clay*, 376 F.3d at 1301. The *Apprendi* requirement explains why the Seventh Circuit—which does not require drug quantity to be charged and proved to a jury in setting mandatory minimum floors—nevertheless expects prosecutors to charge drug quantity in the indictment in every case. See *Krieger*, 628 F.3d at 867 ("[A] post-*Apprendi* in-

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[6] The Sentencing Commission reports that 9,230 of the total 24,442 defendants sentenced for drug trafficking in fiscal year 2011 were sentenced in the Second, Fourth, Ninth and D.C. Circuits. See U.S. Sentencing Comm'n, *Federal Sentencing Statistics by State, District & Circuit for Fiscal Year 2011*, Second Circuit tbl.1, Fourth Circuit tbl.1, Ninth Circuit tbl.1, D.C. Circuit tbl.1 (2011), available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2011/index.cfm. Within the districts from which the sample indictments and verdict forms are drawn, an additional 4,003 defendants were sentenced for drug trafficking during that same year. See *id.* D. Colo. tbl.1, S.D. Fla. tbl.1, C.D. Ill. tbl.1, N.D. Ill. tbl.1, D. Md. tbl.1, E.D. Mich. tbl.1, D. Minn. tbl.1, N.D. Okla. tbl.1, E.D. Pa. tbl.1, D.RI. tbl.1, S.D. Tex. tbl.1.

dictment should specify, and the trier of fact must be instructed to determine, not only the elements of the offense, which appear in § 841(a), but also the events listed in § 841(b) on which the prosecutor relies to establish the maximum sentence.") (citations omitted). Because *Apprendi* requires these steps if a prosecutor wants the option of requesting a sentence over the unquantified maximum, overruling *Harris* and requiring prosecutors to charge and prove drug quantity to a jury to obtain a mandatory minimum will not impose any significant burden on the system.

3. Even in federal districts where it is not common practice to charge drug quantity and prove it to a jury beyond a reasonable doubt, overruling *Harris* will not impose an undue burden on the system. As one court of appeals observed in the wake of *Apprendi*, "[i]t will not be unduly difficult for juries to determine whether an offense involved a specific threshold drug quantity. *** Juries in state drug-trafficking prosecutions routinely perform this function." *United States* v. *Promise*, 255 F.3d 150, 157 n.6 (4th Cir. 2001). In addition, "[s]ince *Apprendi*, federal district courts have proceeded in this manner, submitting special interrogatories to the jury for determination of drug type and quantity, and many have been operating in this manner since *Jones* v. *United States*, 526 U.S. 227 (1999)." *Vazquez*, 271 F.3d at 114 (Becker, J., concurring).

III. OVERRULING *HARRIS* IS CONSISTENT WITH THIS COURT'S PRECEDENT, THE STATUTORY STRUCTURE OF 21 U.S.C. § 841, AND SOUND SENTENCING POLICY.

A. *Harris* Was Inconsistent With *Apprendi* When Decided, And Is Inconsistent With This Court's Subsequent Jurisprudence.

As Justice Breyer observed in *Harris*, one "cannot easily distinguish *Apprendi* . . . from [*Harris*] in terms of logic." 536 U.S. at 569 (Breyer, J., concurring). *Apprendi* requires that any fact that "increase[s] the prescribed range of penalties to which a criminal defendant is exposed" be proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. The plurality in *Harris* characterized that holding as allowing the judge "to impose any sentence below the maximum" once the jury has found the facts necessary to determine that maximum. 536 U.S. at 565 (plurality opinion). Justice Breyer joined the plurality in *Harris* because of his continuing disagreement with *Apprendi*, *id.* at 569 ("I cannot yet accept its rule."), not because of any agreement with the plurality's line drawing. The resulting 4-1-4 decision has led to 10 years of jurisprudential Twister by this Court and considerable confusion in the lower courts over the relationship between *Apprendi* and *Harris*. See, *e.g.*, *United States* v. *O'Brien*, 130 S. Ct. 2169, 2183 n.5 (2010) (Stevens, J., concurring).

Ten years later, *Apprendi* is the settled law of the land; it has been applied consistently and universally by this Court and the lower courts. See, *e.g.*, *id.* at 2174–75; *United States* v. *Booker*, 543 U.S. 220, 244 (2005). And Justice Breyer appears to have accepted its rule. *O'Brien*, 130 S. Ct. at 2183 n.6 (Stevens, J., concurring) (quoting Justice Breyer's com-

ment during oral argument that "at some point I guess I have to accept *Apprendi*, because it's the law and has been for some time"). With *Apprendi*'s precedential status no longer in doubt, *Harris* is ripe for reconsideration. *Cf. United States* v. *Darby*, 312 U.S. 100, 115–16 (1941) (observing the propriety of reversing a relatively recent opinion by a divided court that is in tension with both prior and subsequent cases); *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U.S. 592, 598 (1941) (same).

1. This Court's approach to mandatory sentencing guidelines under *Apprendi* reveals the dissonance created by *Harris*'s holding. As noted above, the subparagraphs of § 841(b)(1) prescribe a series of sentencing ranges based on drug quantity. Moving from one range to another increases both the defendant's statutory maximum and range of exposure. All of this Court's post-*Apprendi* precedents on sentencing regimes that previously allowed judges, acting unilaterally, to increase defendants' sentences looked to the effect that an uncharged, judge-found fact had on the statutory maximum. See *Cunningham* v. *California*, 549 U.S. 270, 288–89 (2007); *Booker*, 543 U.S. at 243–44; *Blakely* v. *Washington*, 542 U.S. 296, 303–04 (2004).

In *Booker*, a jury found the defendant guilty of possession with the intent to distribute 92.5 grams of crack cocaine, which exposed him to a statutory range of 10 years to life under § 841(b)(1)(A)(iii) and a Sentencing Guidelines range of 210 to 262 months. *Booker*, 543 U.S. at 226. At sentencing, a showing that Booker was responsible for an additional 566 grams increased the Guidelines range to 360 months to life. *Id.* Although Booker's sentence was still within the statutory maximum of the offense of conviction

(life), the Guidelines set a different mandatory ceiling that was also constitutionally relevant. *Id.* at 233–34. Defendants may only be sentenced at or beneath the statutory maximum determined "*solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 232 (quoting *Blakely*, 542 U.S. at 303). This feature of the Guidelines, this Court held, meant that they could not be binding. *Id.* at 245; see also *Cunningham*, 549 U.S. at 293 (holding that when a state's determinate sentencing statute "authorizes the judge, not the jury, to find the facts *permitting* an upper term sentence, the system cannot withstand measurement against our Sixth Amendment precedent") (emphasis added). The lower bounds of the Guidelines ranges were equally advisory because "Congress would not have authorized a mandatory system in some cases and a non-mandatory system in others, given the administrative complexities that such a system would create." *Booker*, 543 U.S. at 266.

Without requiring that drug quantity be proved to a jury beyond a reasonable doubt, the sentencing range scheme in § 841(b)(1) is just as constitutionally problematic as the sentencing regimes in *Blakely*, *Booker*, and *Cunningham*. As with the sentencing regimes in those cases, drug quantity under § 841 is an aggravating factor that increases a defendant's range of punishment beyond the range authorized by jury-found facts. Regardless of whether drug quantity found by a sentencing judge sets or increases a mandatory minimum, or increases the statutory maximum, the resulting increased range is invalid under *Apprendi*. Additionally, the circuits that have accommodated *Harris* by rewriting the drug statute have created the administrative complexities this Court avoided in *Booker*. See *Booker*, 543 U.S. at

266. Overruling *Harris* and holding that facts establishing increased ranges must be proved to a jury beyond a reasonable doubt is consistent with the constitutionally-required method for increasing sentencing ranges and avoiding unnecessary complexity in sentencing regimes.

2. The tension between *Harris* and *Apprendi*, as recognized by several justices, has been evidenced by the chaos among the circuits. Even at the time that *Harris* was decided, a majority of the justices believed that it was necessarily inconsistent with *Apprendi*. *Harris*, 536 U.S. at 569 (Breyer, J., concurring); *id.* at 572 (Thomas, J., dissenting). The logical and constitutional problems *Harris*'s rule poses in the context of § 924 are equally dramatic in the context of § 841. Compare *Gonzalez*, 420 F.3d at 126–27 (2d Cir.), with *Washington*, 558 F.3d at 719 (7th Cir.).

B. Treating Drug Quantity As An Element For Mandatory Minimum Sentences Is Consistent With § 841(b)(1).

Although this Court has not confronted whether the structure of § 841(b)(1) necessitates pairing mandatory minimums with their corresponding statutory maximums, see *Washington*, 558 F.3d at 720, such confrontation should not be necessary. This Court has consistently paired minimums and maximums. *E.g.*, *Booker*, 543 U.S. at 227. And the courts of appeals that have explicitly considered the question find mixing and matching minimums and maximums incongruous. See *Gonzalez*, 420 F.3d at 121–22; *Velasco-Heredia*, 319 F.3d at 1086; *Graham*, 317 F.3d at 274. The structure of § 841(b)(1) precludes any other conclusion. Yet a number of courts of appeals have mixed and matched statutory provisions

without regard to whether that practice is consistent with the language of the statute. Overruling *Harris* would end that practice and ensure that § 841 is enforced as written.

1. Without squarely addressing the issue, this Court has repeatedly treated paired mandatory minimums and maximums as ranges. When this Court dealt with § 841 itself in *Booker*, it described Clause (b)(1)(A)(iii) as "prescrib[ing] a minimum sentence of ten years in prison and a maximum sentence of life for" the "offense" of possession with intent to distribute at least 50 grams of crack. *Booker*, 543 U.S. at 227. This language recognizes the link between a specific drug quantity finding and both the minimum and the maximum sentences. That correct reading of the statutory language was reinforced in *Kimbrough* v. *United States*, 552 U.S. 85 (2007), where this Court's analysis rested on the connection between particular drug quantities and sentencing "brackets." *Id.* at 102–03. The court observed that § 841 fixes the range of available sentences through the brackets defined by statutory minimums and maximums, but "says nothing about the appropriate sentences within *these brackets*." *Id.* at 103 (emphasis added).

2. When interpreting other sentencing statutes, this Court has held that separate clauses in sentencing provisions should be treated as independent wholes where a fact is paired with a consequence. See *Jones*, 526 U.S. at 233; *Apprendi*, 530 U.S. at 478. In *Jones*, this Court grouped particular facts with particular sentencing consequences when determining that the carjacking statute, 18 U.S.C. § 2119, as it existed at the time, described three crimes, each with its own sentencing range, rather than one crime with three possible sentencing

ranges. *Jones*, 526 U.S. at 232–33, 252. Each subparagraph of § 841(b)(1) also conditions progressively higher sentencing consequences (specific minimum and maximum sentences) on further facts (specific drug quantities). Each clause therefore should be treated as an independent whole. *Graham*, 317 F.3d at 274.

Consider § 841(b)(1)(A): The subparagraph begins, "In the case of a violation of subsection (a) of this section involving—." Eight numbered clauses describing quantities of various types of illegal drugs follow, each separated by a semicolon and the disjunctive "or." Within the *Jones* framework, these clauses regarding drug quantity and type are the facts necessary for the prescribed penalty. Following these clauses, the same sentence from the start of the subparagraph continues with the sentencing consequence, "such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life ***." The language of the statute draws no distinction between the minimum of 10 years and the maximum of life; not even a comma separates them.

The sentences that follow detailing the consequences of additional aggravating facts emphasize the unitary nature of the subparagraph. They speak in terms of "any sentence under this subparagraph" and "any person sentenced under this subparagraph." Not one statement explicitly applies to a person sentenced under the mandatory minimum of one subparagraph but the statutory maximum of another subparagraph. See *Velasco-Heredia*, 319 F.3d at 1086 (holding that linking a minimum from subparagraph (B) with the maximum from former subparagraph

(D) "fails because it distorts the intent by Congress and creates a link where there is not one").

Moreover, to the extent that the consequences of these additional aggravating facts result in sentences that are identical across subparagraphs, they are nonetheless repeated in each subparagraph. Compare § 841(b)(1)(A) ("[I]f death or serious bodily injury results from the use of such substance[, as enumerated in the preceding clauses, the sentence] shall be not less than 20 years or more than life"), with § 841(b)(1)(B) ("[I]f death or serious bodily injury results from the use of such substance[, as enumerated in the preceding clauses, the sentence] shall be not less than 20 years or more than life"). See also *Gonzalez*, 420 F.3d at 121. Nothing in any of the subparagraphs suggests that the statutory minimums and maximums can be disaggregated from each other or from the corresponding drug quantities. See *id.* at 122 ("Much less does the statutory structure of § 841 suggest Congress's intent to cast drug quantity in a dual role: performing as a sentencing factor for purposes of determining the applicable minimum sentence but as an element for purposes of determining the applicable maximum.").

3. The courts of appeals that have chosen to sever § 841's minimums from its maximums have done so while disregarding the violence done to the statute. The Seventh Circuit, for example, acknowledged the statutory construction problem only in hindsight. Compare *Washington*, 558 F.3d at 720, with *Clark*, 538 F.3d at 811–12 (applying, without analysis, a hybrid sentencing range of 10 to 20 years). The First Circuit analyzed the text, structure, and history of the statute at length. See *Goodine*, 326 F.3d at 31–32. It questioned whether the drug quan-

tity provisions were drafted in the same way that sentencing factors are typically drafted, but did not even consider whether the fact that the minimums and maximums were paired in distinct subparagraphs was relevant to its interpretive task. See *id.*

Other circuits, including the Fifth Circuit and the Eighth Circuit, have not considered the structure of the statute at all. See *Keith*, 230 F.3d at 786–87; *United States* v. *Serrano-Lopez*, 366 F.3d 628, 637–39 (8th Cir. 2004). And the Sixth Circuit initially applied *Apprendi* to statutory ranges, see *United States* v. *Flowal*, 234 F.3d 932, 936 n.2 (6th Cir. 2000), but ignored the structure of § 841 entirely after *Harris* and applied *Harris* to mandatory minimums indiscriminately, see *Leachman*, 309 F.3d at 383. Overruling *Harris* will require courts to treat each of the sentencing ranges in the statute as an independent whole, a result that is consistent with the text and structure of the statute.

4. Mixing and matching is not only inconsistent with the statute, but also creates a notice concern and prevents the jury from playing its proper role under the Sixth Amendment. When courts allow mixing and matching, it is "impossible to know until the final, sentencing phase of the litigation that drug quantity was an element of the crime of conviction" that should have been pleaded and proved to the jury beyond a reasonable doubt. *Gonzalez*, 420 F.3d at 124. Long before sentencing, however, an understanding of which facts must be pleaded and proved directly impacts defendants in "decid[ing] whether to challenge the sufficiency of the government's case or pursue plea negotiations," and trial judges in "rul[ing] on the relevancy and sufficiency of evidence, prepar[ing] jury instructions, and ensur[ing] the fac-

tual bases for guilty pleas." *Id.* at 131; see also Fed. R. Crim. P. 11(b)(1)(I) ("Before the court accepts a plea of guilty or nolo contendere, *** the court must inform the defendant of, and determine that the defendant understands *** any mandatory minimum penalty."). In addition, courts that wait until the sentencing phase to determine whether drug quantity is an element strip juries of their "function as a circuit-breaker in the State's machinery of justice" by "relegat[ing them] to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish." *Blakely*, 542 U.S. at 306–307.

C. Treating Drug Quantity As An Element For Mandatory Minimum Sentences Reduces Racial Disparity In Sentencing.

The newest empirical sentencing research shows that mandatory minimum sentences contribute significantly to sentencing disparities between black and white defendants. A disproportionate number of black defendants receive mandatory minimum sentences. See *2011 Report* 148, 154; Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1687 (2012). This sentencing disparity is exacerbated by the fact that *Harris* permits sentencing judges to impose mandatory minimum sentences where facts are not charged or proved to the jury. Recent studies show that mandatory minimum sentences are disproportionately imposed on black offenders, and support the conclusion that overruling *Harris* will reduce unwarranted sentencing disparities between black and white defendants.

1. Two recent studies conclude that mandatory minimums and prosecutorial discretion are signifi-

cant causes of unwarranted racial sentencing disparities. Professors Joshua B. Fischman and Max M. Schanzenbach's latest research indicates while "[t]he disparity between white and black offenders in prison sentences" has increased after *Rita* v. *United States*, 551 U.S. 338 (2007), *Gall* v. *United States*, 552 U.S. 38 (2007), and *Kimbrough*, "this [disparity] is largely a consequence of *** mandatory minimums." Joshua B. Fischman & Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL LEGAL STUD. 729, 752 (2012). The authors conclude that "judicial discretion likely reduces racial disparities" in the current sentencing regime. *Id.* at 730. The data further indicates that "when mandatory minimums are less relevant, sentences fell by the same proportion for whites and blacks." *Id.* at 761.

Another study likewise concludes that "racial disparities in recent years have been mostly driven by the cases in which judges have the least sentencing discretion: those with mandatory minimums." Sonja B. Starr & M. Marit Rehavi, *Racial Disparity in the Criminal Justice Process: Prosecutors, Judges, and the Effects of* United States v. Booker 48 (U. Mich. L. & Econ. Research Paper No. 12-021, 2012), available at http://ssrn.com/abstract=2170148. The authors, Professors Sonja B. Starr and M. Marit Rehavi, examined data that allowed them to control for a number of factors, including arrest offense, criminal history, district, age, the presence of multiple defendants, and county-level poverty, unemployment, income, and crime statistics. *Id.* at 18. After controlling for all of these variables, "black men were still nearly *twice* as likely to be charged with a mandatory minimum offense: 8% of white males faced such a

charge, compared to nearly 16% of otherwise-similar black males." *Id.* at 19. Even after applying additional controls, including controls for arrest offense and criminal history, the data still indicated a 10% disparity in black-white sentencing in non-drug cases. *Id.* Significantly, when drug cases were added, that disparity rose to 14%. *Id.* And yet "*[n]o significant disparity remained after controlling for the mandatory minimum of conviction*" in drug cases. *Id.* (emphasis added). Imposing the same control in non-drug cases had the same result: "[T]he otherwise-unexplained racial disparity in the average sentence disappeared." *Id.* In other words, the mandatory minimum sentences imposed in both kinds of cases caused the disparity. It should be noted that Starr and Rehavi found "no evidence that *Booker* increased racial disparity in the exercise of judicial discretion; if anything it may have reduced it." *Id.* at 40.

Starr and Rehavi also note that "the most common non-drug mandatory minimum in our data, and the one most responsible for driving sentencing disparities, was 18 U.S.C. § 924(c)," *id.* at 19, the statute at the heart of Alleyne's case. That enhancement "hit[s] black men particularly hard both because they are more frequently arrested for gun crimes *and* because of large apparent disparities in prosecutors' exercise of charging discretion." *Id.* at 50.

2. The disproportionate impact on black defendants that these studies identify is consistent with Sentencing Commission data. One report found: "Blacks accounted for 48 percent of the offenders who appeared to qualify for a charge under 18 U.S.C. § 924(c) but represented 56 percent of those who were charged under the statute and 64 percent of those

convicted under it." U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 90 (2004), available at http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/15_year_study_full.pdf. In the drug context, another report indicated that, while black defendants make up only 27% of all drug offenders, they make up 40% of drug offenders subject to mandatory minimum penalties at sentencing. *2011 Report* 154.

3. Overruling *Harris* will mean that prosecutors will only be able to obtain harsh penalties for a higher drug quantity when they have sufficient evidence to prove it to a jury beyond a reasonable doubt, or to convince a defendant to agree to quantity. This will result in fewer mandatory minimums being imposed, or even charged in the first place. This, in turn, will mitigate the harsh effects of mandatory minimums on black defendants and reduce racial disparity in sentencing.

If *Harris* is overruled, Assistant United States Attorneys will be required to charge drug quantity and prove it to a jury beyond a reasonable doubt in order to obtain mandatory minimum penalties. The government will not be able to obtain a defendant's agreement in marginal cases, and will inevitably fail to meet its burden to prove quantity beyond a reasonable doubt in at least some cases. Verdict forms in actual cases demonstrate that juries sometimes acquit defendants of charged drug quantities, leading judges to impose sentences below the charged mandatory minimum. See, *e.g.*, Verdict Form, *United States* v. *Smith*, No. 1:07-cr-00153-TFH (D.D.C. June 12, 2007), ECF No. 497 (determining the government

had "not proven" a quantity sufficient to set any mandatory minimum); Judgment & Commitment Order, *Smith*, *supra*, ECF No. 554 (demonstrating that defendant Brown was "found guilty" of § 841(c)(1)(C), the "[l]esser included offense of Count 1"); Verdict Form, *United States* v. *Olivo*, No. 1:06-cr-00069-ML-LDA (D.R.I. June 7, 2006), ECF No. 37 (finding defendant responsible for a lower drug quantity than that charged in indictment); Judgment & Commitment Order, *Olivo*, *supra*, ECF No. 50 (sentencing defendant below ten-year mandatory minimum that would have applied had jury found charged quantity); Verdict Form, *United States* v. *Longoria*, No. 2:05-cr-14075-DLG (S.D. Fla. Sept. 27, 2005), ECF No. 103 (finding defendant responsible for a lower drug quantity than that charged in indictment); Judgment & Commitment Order, *Longoria*, *supra*, ECF No. 126 (sentencing defendant below ten year mandatory minimum that would have applied had jury found charged quantity).

While many prosecutors already charge drug quantity and submit it to a jury for a beyond-a-reasonable-doubt finding, see Part II.B, *supra*, seven circuits do not require this practice to set or increase a mandatory minimum. The cases at the heart of the split demonstrate that drug quantity is not always pleaded and proved. It is clear that, in at least some cases, prosecutors exercise their discretion not to charge drug quantity. See, *e.g.*, *United States* v. *Wilson*, 244 F.3d 1208, 1214–16 (10th Cir. 2001). If this Court declines to overrule *Harris*, the circuits that allow mixing and matching will continue to "permit the government in the guilt phase of a case to prove beyond a reasonable doubt that only one kilogram of marijuana was involved in the offense, and then at sentencing to prove 101 kilograms by a preponder-

ance of the evidence." *Velasco-Heredia*, 319 F.3d at 1086. Moreover, raising the standard of proof will lead prosecutors to decline to charge a mandatory minimum in marginal cases.

As a consequence of both the higher standard for proving quantity and the reduction in mandatory minimums charged, fewer mandatory minimum sentences will be imposed. Because a higher percentage of black defendants are subjected to mandatory minimums, fewer mandatory minimum sentences across the board will reduce racial disparity in sentencing.

4. Additionally, requiring drug quantity to be proved to the jury will help ensure that defendants' rights are protected. If *Harris* is overruled, defendants may, "as a matter of trial strategy, *** choose between denying the commission of the crime outright" and contesting facts that require mandatory punishment. *Vazquez*, 271 F.3d at 115 n.2 (Becker, J., concurring). The need to make this kind of choice is inherent in any criminal statute where "penalties vary according to different elements." *Id.* Some defendants may also choose to stipulate to such facts before trial, and *Apprendi* gives them the opportunity to make that choice. Allowing prosecutors to prove mandatory minimum facts to a judge at sentencing by a mere preponderance gives prosecutors more power over the outcome than the sentencing judge. As Alleyne's case illustrates, in most cases, a judge honestly following the law will find the fact triggering a mandatory minimum sentence by a preponderance, and once he does, he has no discretion but to impose the mandatory minimum.

5. A decision resulting in fewer mandatory minimum sentences is unlikely to have any adverse con-

sequences for public safety. The Sentencing Commission has concluded that "certain mandatory minimum provisions apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty." *2011 Report* 345. And leading sentencing scholar Michael Tonry has explained: "The evidence is *** clear that mandatory penalties have either no demonstrable marginal deterrent effects or short-term effects that rapidly waste away." MICHAEL TONRY, SENTENCING MATTERS 135 (1996).

CONCLUSION

Harris v. *United States*, 536 U.S. 545 (2002), should be overruled.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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No. 11-9335

In the Supreme Court of the United States

ALLEN RYAN ALLEYNE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF TEXAS, ALABAMA, ARIZONA, COLORADO, DELAWARE, GEORGIA, HAWAII, KANSAS, MAINE, MICHIGAN, MISSOURI, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

The States have enjoyed the prerogative throughout the eighteenth, nineteenth, and twentieth centuries to establish sentencing enhancements that need not be charged in indictments or treated as "elements" of substantive criminal offenses. The amici curiae have an interest in preserving this reserved power of the States, and correcting the false historical assertions presented by the petitioner and his amicus curiae.

STATEMENT

Allen Alleyne and an accomplice robbed the manager of a convenience store. For this escapade Alleyne was convicted under 18 U.S.C. § 1951(a), which imposes criminal liability on anyone who "obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery." Alleyne was also convicted under 18 U.S.C. § 924(c)(1)(A), which establishes an additional criminal offense for anyone who "uses or carries a firearm" during and in relation to a federal crime of violence, or who "possesses a firearm" in furtherance of that crime.

Alleyne received a seven-year prison sentence for violating § 924(c)(1)(A). He was sentenced under 18 U.S.C. § 924(c)(1)(A)(ii), which imposes a seven-year minimum on those who "brandish[]" the firearm that was used, carried or possessed. Alleyne received this minimum sentence because the district court found, by a preponderance of the evidence, that Alleyne's accomplice had brandished a firearm during the robbery, and that Alleyne reasonably foresaw that this would happen. Because Alleyne's seven-year sentence for violating § 924(c)(1)(A) fell within the maximum allowable sentence for that crime based on the facts found by the jury, the district court was not required to treat the sentencing enhancement in § 924(c)(1)(A)(ii) as an "element" of a substantive offense under the rule of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Fourth Circuit affirmed

Alleyne's sentence, as it was required to do under this Court's binding pronouncements in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), and *Harris v. United States*, 536 U.S. 545 (2002).

Alleyne now wants this Court to extend the rule of *Apprendi* to sentencing enhancements that establish mandatory *minimum* sentences—even when the sentence remains within the maximum allowable punishment based on the facts found by the jury. Alleyne acknowledges that his argument (if accepted) will require this Court to overrule both *Harris* and *McMillan*, and require every fact that increases a defendant's minimum punishment to be treated as an "element" of a substantive crime, which must be charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt.

SUMMARY OF ARGUMENT

Alleyne's argument is unabashedly originalist: he asserts that *McMillan* "broke with the traditional understanding of what constitutes an element," and that drawing distinctions between "elements" and "sentencing factors" is a novel (and therefore unconstitutional) development. *See* Pet'r's Br. at 15–16, 17; *see also id.* at 30 ("There was no such thing as a 'sentencing factor' that could elevate the punishment a judge was allowed or required to impose, and yet not be charged in an indictment and proved to a jury.") (citation omitted).

But Alleyne's historical claims are demonstrably untrue. Courts throughout this nation's history have held that first-degree murder did *not* need to be charged in indictments as an "element" of a substantive crime—even though it increased a defendant's minimum punishment from imprisonment to death. These courts regarded first- and second-degree murder as mere grades of punishment within the unitary offense of murder. The degree of murder was (in modern parlance) a "sentencing factor" that was not charged in the indictment or regarded as an "element" of a crime.

Alleyne and his amici ignore the historical treatment of first-degree murder. Instead, they try to establish a pedigree for their ahistorical understanding of "elements" by relying on Joel Prentiss Bishop's criminal-procedure treatise, which asserts that nineteenth-century indictments were required to include "every fact which is legally essential to the punishment."[1] Bishop's claim is patently false and did not accurately describe the law in actual court decisions of that era. Nineteenth-century courts repeatedly held that first-degree murder did *not* need to be charged in indictments as an "element" of a substantive crime, even though it increased a defendant's minimum punishment from

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[1] *See* Joel Prentiss Bishop, 1 *Criminal Procedure* § 81 at 51 (Little, Brown, 2d ed. 1872).

imprisonment to death. There is no historical pedigree for the rule that Alleyne wants this Court to impose; indeed, historical practice flatly contradicts Alleyne's claim that all facts establishing mandatory minimum sentences were charged in indictments and treated as "elements" of criminal offenses.

ARGUMENT

I. THE HISTORICAL TREATMENT OF FIRST-DEGREE MURDER PROVES THAT FACTS ESTABLISHING MANDATORY MINIMUMS NEED NOT BE CHARGED IN INDICTMENTS OR TREATED AS "ELEMENTS" OF SUBSTANTIVE CRIMINAL OFFENSES.

Alleyne claims throughout his brief that the distinction between "elements" and "sentencing factors" that increase a defendant's minimum punishment was unknown throughout American history. *See* Pet'r's Br. at 30–33. According to Alleyne, all sentencing enhancements were required to be charged in indictments and submitted to juries as if they were "elements" of substantive crimes. *See* Pet'r's Br. at 30 ("There was no such thing as a 'sentencing factor' that could elevate the punishment a judge was allowed or required to impose, and yet not be charged in an indictment and proved to a jury.") (citation omitted); *id.* at 32 ("And when statutory ranges came into use in the 19th century, all facts and circumstances setting the 'outer limits' of the 'range' of punishment the judge could impose had to be charged and proved to a jury.") (citation

omitted); *id.* at 33 ("[I]n cases involving the equivalent of modern-day mandatory minimums in the late 1800s, any aggravating circumstance that increased the range was required to be charged in an indictment and proved to a jury.").

These historical claims are false. The States have employed "sentencing factors" since the early days of the Nation's history. And numerous state-court decisions recognized that these facts were *not* "elements" of substantive crimes and did *not* need to be charged by prosecutors—even when they increased the defendant's punishment.[2] In 1794, Pennsylvania enacted a statute that divided the crime of murder into two degrees: Murder in the first degree was limited to murders "perpetrated by means of poison, or lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary."[3] All other murders were second degree.

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[2] *See, e.g.*, *Hanon v. State*, 63 Md. 123, 126 (1885) ("The mere affixing by statute of a penalty different from that at common law, or adjusting it to specified circumstances of aggravation or mitigation, where the crime or misdemeanor is in its nature susceptible of such variations, without losing its essential characater, *is not the creation of a distinct offence.*") (emphasis added).

[3] *See* 4 Journal of the Senate 242–46 (Pa. 1794); *see also* Gen. Laws Pa., ch. 124 § 2 (Johnson 1849)

Many other states adopted similar schemes. But murder in the first degree was punishable by death—the mandatory minimum sentence (at the time) for first-degree murder. So a first-degree finding was the eighteenth- and nineteenth-century analogue to the "sentencing enhancement" in § 924(c)(1)(A)(ii) that boosted Alleyne's minimum punishment to seven years.

But nineteenth-century courts did not regard a first-degree murder finding as an "element" of an aggravated crime, and did not require it to be charged in the indictment—even though it increased the minimum sentence from imprisonment to death. *White v. Commonwealth*, 6 Binn. 179 (Pa. 1813), was the first published decision construing Pennsylvania's first-degree murder statute, and all the Justices of the state supreme court agreed that the first-degree murder statute did not divide murder into separate offenses. The majority opinion held that indictments need not charge the degree of murder because "first-degree" murder was merely a sentencing category within a unitary offense rather than an element of a separate, aggravated crime:

> All that [the statute] does, is to define the different kinds of murder, which shall be ranked in different classes, and be subject to different punishments. *It has not been the practice since the passing of this law, to alter the form of indictments for*

> *murder in any respect; and it plainly appears by the act itself, that it was not supposed any alteration would be made.* It seems taken for granted, that it would not always appear on the face of the indictment of what degree the murder was.

Id. at 183 (opinion of Tilghman, C.J.) (emphasis added). The dissenting opinion agreed that Pennsylvania's first-degree murder statute "creates no new offence as to willful and deliberate murder. . . . Different degrees of guilt exist under the general crime of murder." *Id.* at 188 (Yeates, J., concurring in part and dissenting in part). No one on the court regarded this fact as part of a substantive criminal offense, even though it increased the minimum punishment from imprisonment to death.

After *White*, the Pennsylvania Supreme Court continued to hold that prosecutors need not charge the degree of murder in indictments.[4] Other jurisdictions that divided murder into degrees likewise held that murder indictments need not mention the degree of the crime. These included the

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[4] *See, e.g.*, *Commonwealth v. Gable*, 7 Serg. & Rawle 423, 427 (Pa. 1821) (opinion of Tilghman, C.J.); *id.* at 429 (Gibson, J., dissenting); *Commonwealth v. Flanagan*, 7 Watts & Serg. 415, 418 (Pa. 1844); *O'Mara v. Commonwealth*, 75 Pa. 424, 429–30 (1874) (quoting *White*, 6 Binn. at 182–83 (opinion of Tilghman, C.J.)).

highest courts of Alabama,[5] Arkansas,[6] California,[7] Colorado,[8] Idaho,[9] Maine,[10] Maryland,[11] Massachusetts,[12] Michigan,[13] Minnesota,[14] the territory of Montana,[15] Nevada,[16] New Jersey,[17] New

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[5] *See, e.g.*, *Noles v. State*, 24 Ala. 672, 693 (1854).

[6] *See, e.g.*, *McAdams v. State*, 25 Ark. 405, 416 (1869). *But see Cannon v. State*, 31 S.W. 150, 153 (Ark. 1895) (suggesting that first-degree murder should be alleged in indictments).

[7] *See, e.g.*, *People v. Murray*, 10 Cal. 309, 310 (1858).

[8] *See, e.g.*, *Garvey v. People*, 6 Colo. 559, 563 (1883).

[9] *See, e.g.*, *State v. Ellington*, 43 P. 60, 61 (Idaho 1895).

[10] *See, e.g.*, *State v. Verrill*, 54 Me. 408, 415–16 (1867).

[11] *See, e.g.*, *Ford v. State*, 12 Md. 514, 529–30 (1859).

[12] *See, e.g.*, *Green v. Commonwealth*, 94 Mass. 155, 170–71 (1866).

[13] *See, e.g.*, *People v. Doe*, 1 Mich. 451, 457–58 (1850).

[14] *See, e.g.*, *State v. Lessing*, 16 Minn. 75, 78 (1870).

[15] *See, e.g.*, *Territory v. Stears*, 2 Mont. 324, 327–28 (1875).

[16] *See, e.g.*, *State v. Millain*, 3 Nev. 409, 442 (1867).

[17] *See, e.g.*, *Titus v. State*, 7 A. 621, 623 (N.J. 1886) (stating that New Jersey's first-degree murder statute "did not create any new crime, but 'merely made a distinction, with a view to a difference in the punishment, between the most heinous and the less aggravated grades of the crime of murder.' . . . [I]t [is] not necessary to set out in the count that the alleged killing was 'willful, deliberate, and premeditated,' [and] it cannot be necessary to show that the killing was in the commission of a

Hampshire,[18] New York,[19] Tennessee,[20] Texas,[21] Virginia,[22] West Virginia,[23] and Wisconsin.[24] Although each of these courts held that murder indictments need not specify the degree of the crime, courts would not hold indictments invalid when they did so.[25] The California Supreme Court, for example, held that courts should simply disregard attempts in indictments to designate a degree of murder.[26] And it allowed such indictments to sustain convictions for *any* degree of murder, even if higher than the degree specified in the indictment.[27] In so holding the court

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rape, which is another of the categories of the same section.") (quoting *Graves v. State*, 45 N.J.L. 347, 358 (N.J. 1883)).

[18] *See, e.g., State v. Williams*, 23 N.H. 321, 324 (1851).

[19] *See, e.g., Cox v. People*, 80 N.Y. 500, 514 (1880).

[20] *See, e.g., Mitchell v. State*, 16 Tenn. 514, 527 (1835); *id.* at 530–34 (Catron, C.J., concurring); *See also Hines v. State*, 27 Tenn. 597, 598 (1848).

[21] *See, e.g., Gehrke v. State*, 13 Tex. 568, 573–74 (1855).

[22] *See, e.g., Commonwealth v. Miller*, 3 Va. 310, 311 (1812).

[23] *See, e.g., State v. Schnelle*, 24 W. Va. 767, 779 (1884).

[24] *See, e.g., Hogan v. State*, 30 Wis. 428, 439–42 (1872).

[25] *See, e.g., People v. Dolan*, 9 Cal. 576, 583 (1858).

[26] *See People v. King*, 27 Cal. 507, 512 (1865). *See also People v. White*, 22 Wend. 167, 175–76 (N.Y. Sup. Ct. 1839); *Stears*, 2 Mont. at 328; *Kirby v. State*, 15 Tenn. 259, 264 (1834).

[27] *See, e.g., People v. Nichol*, 34 Cal. 211, 217 (1867). *See also Stears*, 2 Mont. at 327.

stressed that prosecutors and grand juries should not be allowed to designate sentencing categories at the charging stage; rather, such decisions should be made at the time of defendant's conviction for a crime by the relevant factfinder.[28] The court seemed intent on preventing these sentencing categories from becoming a regime of "charge-offense" sentencing, and would not allow indictments to control sentencing decisions.[29] All of these decisions are directly contrary to the views of Joel Prentiss Bishop, who wrote that according to "those principles of natural reason and justice which are inherent in

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[28] *See, e.g.*, *King*, 27 Cal. at 512 ("The trial jury, and not the grand jury, determine the degree of the crime, and the former should not be embarrassed by the opinion of the latter."); *Nichol*, 34 Cal. at 217 (noting that the duty to fix the degree of crime is "expressly cast upon the trial jury, and the designation of the degree by the Grand Jury is, therefore, as idle as a recommendation to the mercy of the Court appended to a verdict of guilty of murder in the first degree.").

[29] *See also Ellington*, 43 P. at 61 ("How are the jury to find the degree? From the descriptive allegations in the indictment, or from the evidence on the trial? . . . [T]he answer is unavoidable, as it is conclusive, that the degree of the crime is *solely for the trial jury*, and it is not requisite or essential that the words defining the degrees of murder should be set forth in the indictment to constitute a good indictment for murder in the first degree under our statutes.") (emphasis added); *Stears*, 2 Mont. at 327–28; *State v. Thompson*, 12 Nev. 140, 147–48 (1877); *State v. Rover*, 10 Nev. 388, 391 (1875); *Mitchell*, 16 Tenn. at 533 (Catron, C.J., concurring).

the case, . . . the indictment for murder, where the statute divides it into two degrees, should, if murder of the first degree is meant to be proved against the prisoner, contain those allegations which show the offence to be in this degree." Joel Prentiss Bishop, 2 *Criminal Procedure* § 586 at 308 (Little, Brown, 2d ed. 1872).

Several of these state-court decisions considered and rejected the claim in Bishop's treatise that indictments "must contain an allegation of every fact which is legally essential to the punishment to be inflicted."[30] In *State v. Millain*, 3 Nev. 409 (1867), the court expressly disapproved Bishop's views while rejecting a claim that first and second-degree murder were separate offenses requiring distinct indictments. *Id.* at 439–40. The Court noted that "Mr. Bishop has laboured with zeal and ingenuity to show the distinct nature of the two offenses,"[31] but nevertheless concluded that "it was not the intention of the legislature, in making the distinction in the two classes of murder, to require a distinct indictment for each." *Id.* at 439–40, 442. Indeed, the Court noted the "almost [] uniform practice" in other

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[30] Joel Prentiss Bishop, 1 *Criminal Procedure* § 81 at 51. *See also id.* at § 540 ("[T]he indictment must . . . contain an averment of every particular thing which enters into the punishment"); *Apprendi*, 530 US at 510 (Thomas, J., concurring) (citing these provisions in Bishop's treatise).

[31] *Id.*

States allowing a generic murder indictment to sustain convictions for first-degree murder. *Id.* at 442. In denying the petition for rehearing, the Court emphasized that it had "read with great care and attention the arguments of Mr. Bishop as to the necessity of an indictment for murder drawing the distinction between murder of the first and second degree." *Id.* at 479. But this did not persuade the Court to change its previous decision upholding the indictment. *Id.*

Hogan v. State, 30 Wis. 428 (1872), also rejected Bishop's views in a case in which a murder indictment omitted the degree. The dissenting opinion invoked Bishop's treatise and argued that the indictment was bad, but the majority opinion rejected this view, even while recognizing that an indictment "must fully set out the crime charged." *Compare id.* at 439 (majority), *with id.* at 443 (Dixon, C.J., concurring in part and dissenting in part). The majority noted the longstanding view in Wisconsin that murder indictments need not specify a degree to sustain a conviction for murder, even in the first degree. And it wrote that "[t]he acquiescence of a bar so able and learned as the bar of Wisconsin, and for so long a period, . . . and this without a word of dissent from the bench, brings such rule almost within the operation of the maxim, '*stare decisis.*'" *Id.* at 441. The Court also observed that the state legislature had expressly approved the use of common-law form indictments in prosecutions for

first-degree murder, and the Court refused to hold the statute unconstitutional. It therefore felt "constrained to hold that such express averment is unnecessary, and that an indictment in the common law form is sufficient." *Id.* at 440.

Finally, in *State v. Verrill*, 54 Me 408 (1867), the defendant had been convicted and sentenced for first-degree murder based on an indictment that did not allege the degree, even though the state constitution had been construed to require "that *all the elements of*, or facts necessary to, the crime charged, shall be fully and clearly set out" in an indictment. *Id.* at 414 (emphasis added). On appeal, the defendant cited Bishop's treatise to support his claim that his indictment should have alleged first-degree murder. *See id.* at 410 (citing Joel Prentiss Bishop, 2 *Criminal Procedure* §§ 562–97 at 317–53 (Little, Brown, 1st ed 1866)). But the Court rejected the defendant's claim. Even though the first-degree murder finding increased the punishment, it did not need to be charged in the indictment because it was not an element of a crime. The Court explained: "*There is still but one crime denominated murder*, as at the common law, although by the provisions of the statute there are two degrees of that crime, liable to different punishments." *Id.* at 415 (emphasis added).

Other decisions likewise rejected Bishop's claim that indictments should allege every fact essential to guilt. *See, e.g.*, *Ellington*, 43 P. at 61–62; *Territory v. Bannigan*, 46 N.W. 597, 599 (Dakota 1877) (noting

that "a long array of authorities" stands against Bishop's assertion that indictments for first-degree murder "should" allege the degree). All of these jurisdictions made clear that they viewed the degrees of murder as nothing more than sentencing categories within a unitary offense, even though a first-degree murder finding increased the minimum punishment from imprisonment to death.[32]

A few jurisdictions did require murder indictments to allege the degree of the crime.[33] The Iowa Supreme Court, for example, held in *Fouts v. State*, 4 Greene 500 (Iowa 1854), that a common-law indictment for murder, which did not specify the degree of crime, could not support conviction and punishment for first-degree murder. But the court

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[32] *See also Commonwealth v. Gardner*, 77 Mass. 438, 444 (1858); *People v. Haun*, 44 Cal. 96, 98 (1872); *Thompson*, 12 Nev. at 146; *Simpson v. State*, 19 S.W. 99, 102 (Ark. 1892); *State v. Tatro*, 50 Vt. 483, 493 (1878) (quoting Francis Wharton, *A Treatise on the Criminal Law of the United* States § 1103 at 500 (Kay, 4th ed. 1857)); *Mitchell*, 16 Tenn. at 526.

[33] *See, e.g., Finn v. State*, 5 Ind. 400, 403 (1854); *Fouts v. State*, 4 Greene 500, 503 (Iowa 1854); *State v. McCormick*, 27 Iowa 402, 411–12 (1869) (citing Joel Prentiss Bishop, 2 *Commentaries on the Law of Criminal Procedure, or Pleading, Evidence, and Practice in Criminal Cases* § 584 at 333 (Little, Brown 1st ed. 1866) to support *Fouts*'s holding, and reiterating that "the degree [of murder] must be alleged"); *State v. Jones*, 20 Mo. 58, 60–61 (1854); *State v. Brown*, 21 Kan. 38, 49–50 (1878).

recognized that its approach was in the minority, noting that common-law murder indictments were "perhaps good in nearly every other state in the Union." *Id.* at 503. And subsequent Iowa Supreme Court decisions again noted that *Fouts* was opposed to the views expressed in court decisions from other jurisdictions.[34] The Missouri Supreme Court likewise acknowledged that other states had adopted a "different practice," refusing to require indictments to allege first-degree murder, even under "statutes using somewhat similar phrases in declaring what shall be murder in the first degree, and what in the second degree." *See Jones*, 20 Mo. at 61.

So while a few jurisdictions adopted Bishop's view that indictments must charge every fact that increases a defendant's punishment, the first-degree murder cases show that most jurisdictions rejected it, and did not necessarily regard sentencing enhancements as "elements" of separate, aggravated crimes that must be charged in indictments, even when they increase a defendant's punishment.

As further proof that the states did not regard sentencing enhancements as "elements" of

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[34] *See State v. Johnson*, 8 Iowa 525, 529 (1859) (discussing *Fouts*); *McCormick*, 27 Iowa at 408 ("We are aware that the cases are not uniform respecting the question whether, to constitute a good indictment for murder in the first degree, it is necessary to allege that the killing was willful, deliberate and premeditated.").

substantive crimes, some states *would not permit* a criminal defendant to plead guilty to a specific degree of murder. They allowed him to plead guilty only to the unitary offense, and the trial judge would fix the degree and sentence, given that the defendant's guilty plea waived his right to a jury.[35]

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[35] *See, e.g., Weighorst v. State*, 7 Md. 442 (1855) ("[T]he act does not authorize the accused to plead guilty of murder in the second degree. If he confesses at all he must plead to the indictment for murder, and it is then made the duty of the court, by examination of witnesses, to determine the degree of the crime, and to give sentence accordingly."); *Dick v. State*, 3 Ohio St. 89, 93 (1853) ("The prisoner is not allowed to determine the degree of the crime, by a confession with reference to the form and manner of the charge against him; but the degree must be found by the court, from the evidence, without regard to the form of the confession, or the mode in which the crime is charged in the indictment."); *Wells v. State*, 104 S.W.2d 451, 452 (Ark. 1937) (jury must find degree of murder even when defendant pleads guilty to an indictment charging first-degree murder); *Martin v. State*, 38 S.W. 194, 196 (Tex. Crim. App. 1896) ("[A defendant] may plead guilty to murder, but the degree must be found by a jury."); *Wicks v. Commonwealth*, 4 Va. 387, 392–93 (1824) ("But the Law goes on to say, 'but if such person be convicted by confession, the Court shall proceed, by examination of witnesses, to determine the *degree* of the *crime*, and to give sentence accordingly.' Now, if the Indictment must charge the offence to be murder in the first degree or second degree, and if the accused confesses he is guilty of the crime charged upon him by the Indictment, what further enquiry upon that subject can be had?") (emphasis in original). *But see State v. Kring*, 74 Mo. 612, 620 (1881) (noting that defendant entered a plea of guilty to murder in the second degree); *State v. Shanley*, 18 S.E. 734, 736 (W. Va. 1893) (noting

This was an early example of "real-offense" sentencing based on the defendant's actual conduct, rather than charging decisions or plea-bargains. *See, e.g.*, Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8–12 (1988) (explaining the differences between "charge-offense" and "real-offense" sentencing). And this continued well into the twentieth century. The California Supreme Court, for example, held that trial courts must fix the degree of burglary whenever the defendant pleaded guilty to a generic burglary indictment. *See People v. Jefferson*, 52 Cal. 452, 454–55 (1877) (citing CAL. PENAL CODE § 1192 (1876)). These state-court decisions regarded "degrees" of crimes as real-offense sentencing categories rather than "elements" of substantive offenses that could be the subject of plea-bargaining. There is no historical basis for this Court to mandate that sentencing enhancements be treated as elements of separate, aggravated criminal offenses that prosecutors must charge and prove beyond a reasonable doubt whenever they increase the defendant's minimum punishment.

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that a defendant "may plead guilty of murder in the first degree").

II. This Court Should Not Elevate The Opinions Expressed In Joel Prentiss Bishop's Treatise Over The Actual Practice of Nineteenth-Century Courts.

Neither of the briefs filed by Alleyne or the Families Against Mandatory Minimums acknowledges or discusses these nineteenth-century first-degree murder cases. Instead, they invoke Joel Prentiss Bishop's treatise to support their revisionist understandings of "elements" and "crimes." But the first-degree murder cases show that these statements from Bishop's treatise were aspirational rather than an accurate description of nineteenth-century American practice (much less evidence of what the U.S. Constitution requires). Bishop himself recognized that the law of first-degree murder could not be reconciled with his belief that indictments should charge "every fact which is legally essential to the punishment" as an element of a crime. *See* Joel Prentiss Bishop, 3 *New Criminal Procedure* §§ 500, 561–589 (Flood, 2d ed. 1913). Indeed, he bemoaned the holdings of those cases, writing that "to a lamentable extent have our courts, not consulting the teachings of our books of the law, or resorting to accurate reasonings, done, upon the subject of the indictment [in first-degree murder cases], the very highest champion blundering." *Id.* § 500 at 277.

Treatise writers often have their own agendas, and this was as true in the nineteenth century as it is today. Even Justice Story's *Commentaries on the*

Constitution is colored by his strong normative commitment to federal supremacy, and as a result it makes some questionable assertions about the Constitution's meaning. *See, e.g.*, John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997) (criticizing Justice Story's "mandatory theory" of Article III jurisdiction). Joel Prentiss Bishop also wrote from a particular normative framework,[36] yet Alleyne invokes Bishop's treatise as if it were akin to an ex cathedra pronouncement. Alleyne's attempt to establish a constitutional rule by relying on Bishop's aspirations, at the expense of the actual practice of nineteenth-century courts, is reminiscent of internationalists who try to derive customary international law from the "writings of jurists" rather than the actual practices of nation-states. *See* Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000).

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[36] *See* Stephen A. Siegel, *Joel Bishop's Orthodoxy*, 13 LAW & HIST. REV. 215, 216–17 (1995) ("Bishop adhered to a traditional, religiously informed jurisprudence that was antithetical to . . . more modern, secularist views."); *id.* at 218 ("Bishop used metaphysical assumptions to justify classical jurisprudence as a descriptive and normative account of America law.").

Alleyne and Families Against Mandatory Minimums also rely on Justice Thomas's concurrence in *Apprendi*, which relied on Bishop's treatise and cited a handful of nineteenth-century state-court decisions that spoke favorably of Bishop's views. *See* Pet'r's Br. at 33–34; FAMM Amicus Br. at 7, 13–14. Yet many of the state courts cited by Justice Thomas interpreted their first-degree murder statutes in a manner irreconcilable with Bishop's views of the indictment and his understanding of "elements."[37] At most, the cases mentioned in Justice Thomas's *Apprendi* concurrence show that *some* sentencing enhancements were charged in indictments in *some* situations. But there was no obligation, constitutional or otherwise, to treat *every* fact that increases the defendant's minimum punishment as an element of a substantive crime that must be charged in the indictment.

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[37] Compare *Apprendi*, 530 U.S. at 511–12 (Thomas, J., concurring) (citing, among others, state-court decisions from Texas, Maryland, and Maine that spoke approvingly of Bishop's views) with *Gehrke*, 13 Tex. at 573–74 (holding that an indictment charging murder in its common-law definition sufficient to sustain conviction and punishment for murder in the first degree); *Ford*, 12 Md. at 549 (holding that there was "no defect in the indictment" that charged the defendant with common-law murder without specifying the degree). *See also Verrill*, 54 Me. at 415–16 (rejecting the defendant's argument that "the indictment does not set out a murder in the first degree, therefore insufficient to sustain the verdict").

It is troubling that Alleyne and his amicus never acknowledge the historical treatment of first-degree murder, while they simultaneously proclaim that sentencing enhancements have been charged in indictments and treated as "elements" since time immemorial. *See, e.g.*, Pet'r's Br. at 30 ("There was no such thing as a 'sentencing factor' that could elevate the punishment a judge was allowed or required to impose, and yet not be charged in an indictment and proved to a jury.") (citation omitted); Pet'r's Br. at 32 ("And when statutory ranges came into use in the 19th century, all facts and circumstances setting the 'outer limits' of the 'range' of punishment the judge could impose had to be charged and proved to a jury.") (citation omitted); Pet'r's Br. at 33 ("[I]n cases involving the equivalent of modern-day mandatory minimums in the late 1800s, any aggravating circumstance that increased the range was required to be charged in an indictment and proved to a jury."); FAMM Amicus Br. at 14 ("[E]arly American courts required the precise facts that authorized punishment under a criminal statute to be clearly laid out in the indictment."). This Court deserves a complete picture of the historical evidence from litigants who are attempting to establish a constitutional principle by relying on a supposed unbroken practice or tradition. Numerous scholars have complained about "law-office history" that all too often infects constitutional discourse, in which litigants and even legal scholars rely on poorly supported

generalizations or partisan distortions of the historical record. *See, e.g.*, Martin H. Flaherty, *History "Lite" in Modern American Constitutionalism*, 95 COLUM. L. REV. 523 (1995). The briefs submitted by Alleyne and the Families Against Mandatory Minimums do little to alleviate this situation with their selective reporting of the relevant history.

III. THE HISTORICAL ARGUMENTS PRESENTED BY THE FAMILIES AGAINST MANDATORY MINIMUMS DO NOT SUPPORT ALLEYNE'S REQUEST TO OVERRULE *MCMILLAN* AND *HARRIS*.

The amicus brief submitted by the Families Against Mandatory Minimums ("FAMM"), like the petitioner's brief, makes numerous assertions that are contradicted by the nineteenth-century law of first-degree murder. *See, e.g.*, FAMM Br. at 5 ("The facts necessary to trigger such a statutory sentence had to be alleged in the indictment . . . ."); *id.* at 7 ("English and early American courts recognized that these aggravating circumstances had to be alleged in the indictment . . . ."); *id.* at 14 ("[E]arly American courts required the precise facts that authorized punishment under a criminal statute to be clearly laid out in the indictment."). But the FAMM amicus brief also offers some arguments based on the historical treatment of statutory misdemeanor offenses and statutes that withdrew the benefit of clergy for certain felonies. *See id.* at 8–16; 16–23.

None of this discussion supports the claim that Alleyne is advancing in this case.

Consider first the amicus brief's discussion of statutory misdemeanors. The amicus rightly notes that "all of the elements of a statutory offense had to be set forth even to the extent they went beyond the requirements of the common law." FAMM Br. at 11. But everyone agrees that "elements" of statutory offenses must be alleged in the indictment; the issue to resolve in this case is whether the sentencing enhancement in § 924(c)(1)(A)(ii) *is* such an "element." For the amicus brief to invoke that undisputed and uncontroversial proposition as a reason to rule in Alleyne's favor is a textbook example of begging the question. Each of the examples cited in this section of the amicus brief involves facts that were undeniably marked as "elements" in the statute defining the misdemeanor offense. These examples give no leverage in resolving the question that must be decided in this case: Whether a sentencing factor that does *not* purport to define a substantive criminal offense must nevertheless be treated as an "element" of a crime for constitutional purposes.

As for the benefit-of-clergy point, the law of first-degree murder proves that not every fact that increased the minimum punishment imposed on a defendant was charged in the indictment as an "element" of a substantive crime. All that the Families' amicus brief has shown is that *some* facts

that increased a defendant's minimum punishment were alleged in indictments in *some* situations—and this is only if one accepts Alleyne's efforts to equate the jurisdictional benefit-of-clergy doctrine with modern-day sentencing enhancements.[38] It is a non-sequitur to invoke this evidence as proof for the claim that Alleyne is advancing in this case: That *every* fact that increases a defendant's minimum punishment must be charged in the indictment and proved to a jury beyond a reasonable doubt as if it were an "element" of a substantive crime. The amicus curiae's argument, if accepted, would also require this Court to overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), because benefit of clergy was unavailable to recidivist offenders. *See* John Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1, 37–41 & n.145 (1983).

Finally, although it may have been theoretically possible for capital punishment to be imposed on a defendant who claimed benefit of clergy, the amicus curiae acknowledges that this was "rare" and does not cite any American case in which this happened. In practice, the benefit-of-clergy doctrine functioned as a one-free-bite rule that effectively immunized the

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[38] As the Solicitor General correctly notes, "[b]enefit of clergy was neither a 'punishment' nor a 'sentence,' but instead 'operat[ed] as a kind of statute pardon.' 5 *Blackstone's Commentaries* 373." Resp. Br. at 46.

defendant from the death penalty. *See id.* at 39 & n.153 ("Everyone charged with a clergyable felony was entitled to benefit of clergy for his first offense." (quoting 1 J.F. Stephen, A History of the Criminal Law of England 463 (1883)). The factual circumstances that took a case outside the benefit of clergy should therefore be viewed as boosting the *maximum* allowable punishment by making the defendant eligible for capital punishment—in addition to increasing the minimum punishment by exposing the defendant to a mandatory death sentence. These types of facts—which increase *both* the maximum and minimum punishment that can be imposed on a defendant—already fall within the rule of *Apprendi*. *See Apprendi*, 530 U.S. at 483 n.10 ("[F]acts that expose a defendant to a punishment greater than that otherwise legally prescribed [a]re by definition 'elements' of a separate legal offense."). The issue in this case, however, is whether facts that establish mandatory minimums *without* increasing the ceiling on a defendant's punishment must be treated as "elements" for constitutional purposes, requiring them to be charged in an indictment, submitted to a jury, and proved beyond a reasonable doubt. It is a stretch to use the history of the benefit-of-clergy doctrine as support for the proposition that Alleyne is advancing in this case: That facts establishing mandatory minimums must be treated as "elements" of substantive offenses *even when they do not increase the maximum punishment allowed based on the facts found by a jury.*

IV. THIS COURT CANNOT OVERRULE *MCMILLAN* AND *HARRIS* WITHOUT TURNING STARE DECISIS INTO AN EMPTY AND ARBITRARY DOCTRINE.

This Court can and should overrule judicial precedents that misconstrue the Constitution. The Constitution represents the "supreme Law of the Land" and it cannot be subordinated to a wrongly decided opinion of this Court. *See* U.S. CONST. art. VI, cl. 2. The doctrine of stare decisis should never be used as a justification for nullifying constitutional legislation, or upholding unconstitutional actions of the political branches.

But sometimes the answer to a constitutional question is unclear, and the matter is debatable even among jurists who share the same interpretive methodologies. In these situations, stare decisis is an appropriate decision-making heuristic. *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 53 (2001); Frederick Schauer, *Precedent and the Necessary Externality of Constitutional Norms*, 17 HARV. J.L. & PUB. POL'Y 45 (1994). And if the doctrine of stare decisis is to have any meaning, it must be given controlling effect in a case such as this, in which the historical evidence shows, contrary to Alleyne's assertions, that sentencing enhancements have *not* always been treated as "elements" of substantive crimes.

Stare decisis has even greater force in this case because *McMillan* was reconsidered and reaffirmed only ten years ago in *Harris*, a post-*Apprendi*

decision. This makes *Harris* a "precedent on whether or not to revisit [a] precedent,"[39] and distinguishes it from both *Walton v. Arizona*, 497 U.S. 639 (1990), which this Court overruled in *Ring v. Arizona*, 536 U.S. 584 (2002), on the ground that is was incompatible with *Apprendi*, and *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which this Court has declined to overrule notwithstanding the indefatigable efforts of convicted prisoners and the criminal-defense bar.

Finally, there is no logical incompatibility between *McMillan* and *Harris*, on the one hand, and *Apprendi* and its progeny, on the other. There is a fundamental difference between a fact that is *necessary* to impose a sentence, and one that is *sufficient* to impose that sentence, and there is nothing arbitrary or unprincipled about a regime that requires a criminal to be sentenced within the range of punishment authorized by the facts found by a jury, but that does not require a jury finding for facts requiring a minimum sentence that the sentencer was already authorized to impose. It is much harder to defend the *Almendarez-Torres* exception to *Apprendi*, whose existence appears to be solely the product of path dependency. *Cf.* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV.

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[39] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the U.S.: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., S. Hrg. 109–158, at 145 (2005).

L. REV. 802 (1982). If *Almendarez-Torres* can be preserved for thirteen years after *Apprendi*—and presumably will continue to exist after the Court disposes of this case—it is hard to see how Alleyne can sustain his assertion that *McMillan* and *Harris* cannot coexist with *Apprendi*.

If this Court opts to overrule *McMillan* and *Harris*, the States will be left wondering whether they can rely on any precedent of this Court rejecting *Apprendi*-related claims. Presumably *Almendarez-Torres* will be next on the chopping block, and States will have to prosecute recidivist offenders without knowing whether a failure to submit recidivism to the jury will result in a new trial or sentencing proceeding. This dilemma is particularly acute because evidence of recidivism is often inadmissible at trial, and States generally do not retain juries to act as factfinders in bifurcated sentencing proceedings in non-capital cases. The future of *Oregon v. Ice*, 555 U.S. 160 (2009), will be equally uncertain. It is hard to see how any State can reasonably rely on that decision when the four dissenters insisted that its holding was incompatible with *Apprendi* and when one member of the five-justice majority in *Ice* has retired.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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